REPORT

OF THE

ATTORNEY GENERAL

OF THE

STATE OF NEBRASKA

FOR THE

BIENNIUM ENDING DECEMBER 15, 1930

C. A. SORENSEN

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ATTORNEYS GENERAL OF THE STATE OF NEBRASKA

Champion S. Chase	February 21, 1867	January 11, 1869
Seth Robinson	January 11, 1869	January 10, 1871
George H. Roberts	January 10, 1871	January 13, 1873
Joseph R. Webster	January 13, 1873	January 11, 1875
George H. Roberts	January 11, 1875	January 9, 1879
Caleb J. Dilworth	January 9, 1879	January 4, 1883
Isaac Powers, Jr.	January 4, 1883	January 8, 1885
William Leese	January 8, 1885	January 8, 1891
George H. Hastings	January 8, 1891	January 3, 1895
Arthur S. Churchill	January 3, 1895	January 7, 1897
Constantine J. Smyth	January 7, 1897	January 3, 1901
Frank N. Prout	January 3, 1901	January 5, 1905
Norris Brown	January 5, 1905	January 3, 1907
Wm. T. Thompson	January 3, 1907	October 28, 1910
Arthur F. Mullen	October 31, 1910	January 5, 1911
Grant G. Martin	January 5, 1911	January 7, 1915
Willis E. Reed	January 7, 1915	January 9, 1919
Clarence A. Davis	January 9, 1919	January 4, 1923
O. S. Spillman	January 4, 1923	January 4, 1929
C. A. Sorensen	January 4, 1929	January 8, 1931

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REPORT OF THE ATTORNEY GENERAL

Lincoln, Nebr.,
January, 1, 1931

Honorable Arthur J. Weaver,
Governor of Nebraska.

Sir:

I have the honor to submit herewith the report of the attorney general for the biennium ending January 7, 1931. In it will be found a statement of of the official duties of the attorney general and a resume of the most important activities of his department in the performance of these duties during the period covered by this report. The report contains a list of the cases handled by this department in the state and federal courts and the disposition that has been made of them.

CONSTITUTIONAL AND STATUTORY DUTIES

The attorney general is created by Section 1, Article IV of the Constitution of Nebraska one of the executive officers of the state. His term of office is two years as provided in Section 32-207, Compiled Statutes for 1929. His salary as fixed by Section 3, Article XVII of the Constitution, is $5,000.00 per annum. By Section 84-201, Compiled Statutes for 1929, the attorney general is made the head of the department of justice.

Sections 84-203 to 84-205, inclusive, Compiled Statutes for 1929, outline generaly the duties of the attorney general as follows:

> "The attorney-general is hereby authorized to appear for the state and prosecute and defend in any court or before any officer, board, or tribunal, any cause or

matter, civil or criminal, in which the state may be a party or interest: provided, further, that, if the state engineer shall have drawn any plans or specifications for the construction of bridges or other public structures for any county in this state and such plans shall have been adopted by any such county and bids let thereon and the same constructed, by any person, corporation or association and suit is brought against such county, person, corporation or association for damage on account of the infringement on any alleged United States patent, in any court, state or federal, it shall be the duty of the attorney-general to intervene in said suit in behalf of the state and defend the same or if intervention cannot be had, then the attorney-general shall take charge of said suit for such county, person, corporation, or association and defend the same or he may employ counsel to defend the same and the fee of such counsel and other expenses shall be paid from appropriations made to the office of the attorney-general."

"The attorney general and the department of justice shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties."

"The duties of the attorney-general shall be: 1. To appear and defend actions and claims against the state. 2. To consult with and advise the county attorneys, when requesed by them, in all criminal matters and in matters relating to the public revenue. He shall have authority to require their aid and assistance in all matters pertaining to his duties in their respective counties and may in any case brought to the supreme court from their respective counties demand and receive the assistance of the county attorney from whose county such case is brought. 3. To give, when required, without fee, his opinion in writing upon all questions of law submitted to him by the governor, the head of any executive department, the secretary of state, state treasurer, auditor of public accounts, commissioners of public lands and buildings, superintendent of

public instruction, the Nebraska state railway commission or either branch of the legislature. 4. At the request of the governor, the head of any executive department, the secretary of state, state treasurer, auditor, land commissioner, superintendent of public instruction or state railway commission, to prosecute any official bond or any contract in which the state is interested, deposited with either of them and to prosecute or defend for the state all actions and proceedings, civil or criminal, relating to any matter connected with either of their departments: Provided, after investigation he is convinced there is sufficient legal merit to justify the proceeding. None of the above named officers shall pay or contract to pay from the funds of the state any money for special attorneys or counselors at law unless the employment of such special counsel shall be made upon the written authorization of the governor or the attorney-general. 5. To enforce the proper application of moneys appropriated by the legislature to the various funds of the state and prosecute breaches of trust in the administration of such funds. 6. To prepare whenever requested by the governor, secretary of state, state treasurer, state auditor or other executive department, proper drafts for contracts, forms, or other writings which may be wanted for the use of the state and report to the legislature or either branch thereof whenever requested upon any business pertaining to the duties of his office. 7. To pay all moneys received, belonging to the people of the state, immediately upon receipt thereof into the state treasury. 8. To keep a record in proper books provided for that purpose at the expense of the state, a register of all actions and demands prosecuted or defended by him in behalf of the state and all proceedings had in relation thereto and deliver the same to his successor in office. 9. To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the supreme court in which the state is interested or a party and when requested by the governor or either branch of the legislature

> to appear for the state and prosecute or defend any action or conduct any investigation in which the state is interested or a party before any court, officer, board or tribunal or commission."

In addition to the general duties above recited, the laws of this state assign numerous other duties and functions to the attorney general. Among these are:

To prosecute railway companies and common carriers for violation of orders of the state railway commission (Sec. 75-509, Comp. St. 1929);

Prepare contracts for the erection of buildings for the board of control (Sec. 83-122, Comp. St. 1929);

Require foreign corporations to file annual statements and undertakings with the department of justice (Sec. 59-804, Comp. St. 1929);

Require foreign corporations to furnish him with special statements regarding their affairs at any time he may see fit (Sec. 59-805, Comp. St. 1929);

Prepare the ballot title for initiative and referendum measures (Sec. 32-1906, Comp. St. 1929);

Represent Nebraska water-users in all suits affecting their rights in interstate streams (Sec. 84-208, Comp. St. 1929);

Consult with and advise the state railway commission (Sec. 75-211, Comp. St. 1929), and represent it before the interstate commerce commission (Sec. 75-212, Comp. St. 1929);

Give assistance and advice to the state fire marshal (Sec. 81-5504, Comp. St. 1929);

Join with the governor in advising and consenting to the destruction of old and useless records of the constitutional state officers, boards and commissions (Sec. 84-713, Comp. St. 1929);

Assist the board of control in carrying out the provisions of the sterilization law (Sec. 83-1508, Comp. St. 1929);

Be entitled to be heard in all actions for a declaratory judgment when a statute, ordinance or franchise is declared to be unconstitutional (Sec. 20-21, 150, Comp. St. 1929);

Bring an action to enforce any statute enforcement of which is sought to be enjoined in federal court (Sec. 20-21, 156, Comp. St. 1929);

Institute proceedings to compel attendance of witnesses at hearings of board of equalization (Sec. 77-604, Comp. St. 1929);

Approve, with the governor and secretary of state, bonds given by depositories of state funds (Sec. 77-2503, Comp. St. 1929);

Approve bonds of persons circulating initiative or referendum petitions outside the county of their residence (Sec. 32-1904, Comp. St. 1929);

Approve, with the auditor, the articles of incorporation of employers' mutual liability insurance associations (Sec. 44-1301, Comp. St. 1929);

Prepare, with the secretary of state, all forms necessary to carry out the provisions of the primary election law (Sec. 32-1170, Comp. St. 1929);

Investigate complaints and enforce liability on statutory bonds given by school book publishers (Sec. 79-1808, Comp. St. 1929);

Assist the governor in making an investigation of the activities of the guarantee fund commission (Sec. 8-1109, Comp. St. 1929);

Investigate violations of the liquor laws (Sec. 53-134, Comp. St. 1929);

Inspect books and records of corporations and other associations doing business in Nebraska in aid of enforcement of laws forbidding restraint of trade (Sec. 59-808, Comp. St. 1929);

Investigate charges of unfair discrimination in prices (Sec. 59-505, Comp. St. 1929), and, with the county attorneys, enforce the provisions of the anti-discrimination laws (Sec. 59-504, Sec. 59-822, Comp. St. 1929);

Enforce, with the county attorneys, the blue sky laws (Sec. 81-5424, Comp. St. 1929);

Represent the department of trade and commerce in all actions brought under the insurance laws (Sec. 44-1110, Comp. St. 1929);

Institute actions when requested under the corrupt practices act (Sec. 32-2009, Comp. St. 1929);

Prosecute violations of the laws regulating the healing arts (Sec. 71-904, Sec. 71-2218, Comp. St. 1929);

Prosecute violations of the laws concerning plant disease (Sec. 2-1026, Comp. St. 1929);

Bring suit, at the request of the department of public welfare, to revoke or suspend licenses of persons licensed to practice the healing arts (Sec. 71-604, Comp. St. 1929);

Bring proceedings in quo warranto, at the direction of the governor, to oust employees under the civil administrative code (Sec. 81-411, Comp. St. 1929);

Bring quo warranto proceedings against any person unlawfully holding any public office or unlawfully exercising a franchise within the state (Sec. 20-21113, Comp. St. 1929);

Bring ouster procedings against public officers failing or refusing to enforce the liquor laws (Sec. 53-145, Comp. St. 1929);

Bring actions to revoke charters of common carriers for repeated wilful violations of the anti-rebate laws (Sec. 74-817, Comp. St. 1929);

Bring actions, at the request of the secretary of state, to annul the charters of corporations wilfully failing to file their reports and pay fees to the secretary of state (Sec. 24-1717, Comp. St. 1929);

Bring actions to place insolvent banks in the charge of the department of trade and commerce (Sec. 8-185, Comp. St. 1929);

Bring actions to place insolvent building and loan associations in the charge of the department of trade and commerce (Sec. 8-319, Comp. St. 1929);

Bring actions for appointment of receivers for insolvent installment investment companies (Sec. 81-5109, Comp. St. 1929);

Bring quo warranto proceedings to dissolve public markets guilty of vioating the law (Sec. 59-904, Comp. St. 1929);

Bring action for the appointment of a receiver to wind up the affairs of insolvent burial associations (Sec. 24-1011, Comp. St. 1929);

Bring action to restrain unlawful diversion of funds from charitable institutions and homes (Sec. 24-611, Comp. St. 1929);

Bring action to enjoin foreign fraternal insurance associations refusing to file reports required by law from doing business in this state (Sec. 44-1219, Comp. St. 1929);

Bring action to enjoin corporations and other associations from repeated violations of the anti-monopoly laws (Sec. 59-811, Comp. St. 1929);

Bring action against foreign corporations doing business in Nebraska to recover forfeiture for failure to appoint resident agent or to file its certificate (Sec. 24-1206, Comp. St. 1929);

Bring action to recover penalties from domestic corporations failing to file reports and pay fees required by law (Sec. 24-1715, Comp. St. 1929);

Sue to recover the statutory penalty against bank failing to file the reports and statements required by law or operating without a charter (Sec. 8-132, Comp. St. 1929);

Sue to recover forfeiture from county clerks for failure to

make reports to department of trade and commerce concerning state hail insurance (Sec. 44-1411, Comp. St. 1929);

Represent the state before the board of equalization in controversies with railroads regarding taxation of railroads (Sec. 77-509, Comp. St. 1929);

Bring suit to collect tax and penalty assessed by the board of equalization against express companies upon their failure to report (Sec. 86-604, Comp. St. 1929);

Bring suit to collect delinquent gasoline taxes (Sec. 66-407, Comp. St. 1929);

Bring suit against promoters of boxing matches for the statutory penalty for failure to make report of matches (Sec. 71-3114, Comp. St. 1929);

Bring suit for damages against contractors for public printing who fail to carry out their contracts (Sec. 81-403, Comp. St. 1929);

Bring suit to recover penalties from railroads for violation of laws relating to motor cars and motor trains (Sec. 74-515, Comp. St. 1929);

Bring suits against corporations and other associations to recover statutory forfeiture for violation of the laws relating to lobbying (Sec. 50-304, Comp. St. 1929);

Bring suit to recover penalty for failure of the state treasurer to perform any duty required of him by law (Sec. 77-2505, Comp. St. 1929);

Bring suit to recover forfeiture against any person or corporation maintaining wires across a railroad track in illegal manner (Sec. 86-311, Comp. St. 1929).

The constitution provides that the attorney general shall be a member of the board of commissioners for educational lands and funds (Art. VII, Sec. 1), and a member of the board of pardons

(Art. IV, Sec. 13). He is also a member of the state board of canvassers whose duty it is to canvass the votes cast at elections (Sec. 32-924, Comp. St. 1929).

HISTORY OF OFFICE

The office of attorney general is one of the most ancient and important that has come down to us from the Anglo-Norman system of government. As early as 1253 mention is made of *attornatus regis* or the King's attorney, and it is certain that the office had already long been in existence at that time. It was not, however, until the year 1472 that the first formal patent of appointment was issued.

The functions of the attorney general were, from the first, recognized as of great constitutional importance. He was considered not only the legal representative of the crown but also the *parens patriae* or guardian of public interests. His duty was not solely nor even primarily to represent and protect the rights of the King but to represent and protect the rights of the public in all legal matters tinged with a public interest.

When the American colonies, after having established their independence, proceeded to form a federal government, they recognized that, although the new government would not tolerate a king, a necessity still existed for a public officer similar to that of the British officer the attorney general, who should be charged with the protection of public rights and the enforcement of public duties. Accordingly, in organizing the judicial business of the government, they made provision for an attorney general of the United States who should be at the head of the department of justice, and whose duties and functions were essentially the same as those of the attorney general of Great Britain, but who should receive his commission by appointment from the president.

When the government of Nebraska was organized it was, of course, modeled closely after that of the federal government except that provision was made that the attorney general should be an elective and not an appointive office.

Thus in Nebraska the attorney general, in addition to the many constitutional and statutory powers and duties vested in him, is charged with the general duties and functions of guarding the rights and interests of the public vested in the office by the common law, and the offiice has long been recognized as one of great responsibility, in many respects equaling in importance that even of the governor. As head of the state's department of justice he is, within the scope of his department, independent of and co-ordinate with all other executive officers.

By reason of his independent status as principal law officer of the state and head of the department of justice the attorney general has authority to initiate actions in the name of the state on his own motion without authorization of the governor or other state officer. This important power was jealously guarded by the common law and has been carefully preserved by constitutional and statutory enactments.

WORK PERFORMED

Criminal Appeals

A considerable part of the work performed by the department has been to brief and argue before the supreme court appeals from the district courts of criminal cases. During the period covered by this report eighty-two criminal appeals have been disposed of in the supreme court and twenty-one are now pending in that court, many of which have been argued and submitted but not yet decided by the court. Of the eighty-two criminal cases disposed of the department has won affirmances in sixty, and two were dismissed by the appellants before the cases could be heard. Twenty cases were reversed by the court. Thus the proportion of affirmances to reversals won by the department has been exactly three to one.

Of the criminal appeals handled by the department twenty-five have been for violations of the liquor laws; eight for first degree murder, four for second degree murder; two for manslaughter; eight for rape; four for burglary; four for larceny; three for robbery; eight for embezzlement; two for bank robbery; five for forgery, and the remainder for miscellaneous crimes.

It should be said, in passing, that with a few exceptions, the department had nothing to do with the trial of these cases in the district courts and was in no way responsible for the errors made during the trial in the district court which caused the reversal of those cases which were reversed.

Among the cases reversed are those of Garret v. State, Pembrook v. State, and O'Neill v. State, in which the defendants were subsequently convicted and are now serving their sentences in the penitentiary; Fetty v. State, which was twice reversed by the supreme court and is now pending on appeal in that court following a third conviction in district court; Greiss v. State, in which the defendant was again convicted in the district court following its reversal and is now pending on appeal in the supreme court a second time; and Trobough v. State, which was twice reversed by the supreme court and is now awaiting retrial in the district court.

Of the remaining twelve cases which were reversed, six were remanded to the district court for further proceedings and six were dismissed by the supreme court and the defendants discharged.

Thus, of the eighty-two criminal appeals disposed of in the supreme court the defendants won their freedom by order of the court in but six cases. In fourteen cases the cause was reversed and remanded to the district court for further proceedings. In two cases the defendants dismissed their appeals before the cases could be heard. In sixty cases the court affirmed the judgment of the trial court.

It should be mentioned that the department has endeavored to aid the supreme court in an expeditious handling of its cases, both criminal and civil, by keeping its work in that court up to date at all times. Except in one or two unusual cases, no requests for extensions of time for filing briefs or arguing cases have been made by this department of the supreme court and the department has cooperated with the court to the fullest extent in the court's effort to clear its docket and speed up the disposition of cases.

Civil Appeals

In addition to the criminal appeals above mentioned, this office

has prepared and argued fifty-seven civil cases in the supreme court. All of these except two or three were cases appealed from the district courts.

Of the fifty-seven civil cases handled by the department in the supreme court it has won twenty-six, lost seventeen, and fourteen are still pending. Certain of the more important of these cases will be commented upon more fully later in this report.

District Court Cases

During the period covered by this report the attorney general has appeared as counsel in one hundred sixty-two cases in the district courts of Nebraska. Of these, fifty-nine have been criminal proscutions and one hundred and three civil cases.

Of these criminal cases, convictions have been secured in nineteen cases; the defendant was acquitted in eight; two have been dismissed on the state's motion and twenty-eight cases are pending, awaiting trial. In one case the defendant is a fugitive from justice and in another the defendant is in a neighboring state which refuses to grant extradition.

Of the civil cases, this department has won judgments favorable to the state in forty. Twenty-five cases were lost. Sixteen cases have been settled and dismissed. Twenty-two cases are still pending and awaiting trial.

Several of the cases lost in the district courts have since been won in the supreme court. Among the most important of these are the cases of Abie State Bank v. Weaver, et al., State ex rel Beatrice Creamery Co. v. Marsh, and Eidenmiller v. Department of Public Works.

Inferior Court Cases

During this period the attorney general has appeared of counsel in a large number of suits and preliminary hearings in county and municipal courts.

Hearings Before Code Departments

The attorney general has represented the department of public welfare in seven formal hearings for revocation of licenses under the uniform licensure law, such actions being brought by the attorney general at the request of the secretary of the department of public welfare. He has also filed more than four hundred petitions before said department for revocation of professional licenses for non-payment of dues, which licenses were revoked in default of the appearance of the defendants.

The attorney general has represented the state and its agencies in eight suits before the compensation commissioner for workman's compensation.

The attorney general represented the board of control in a hearing before the board of examiners of mental defectives brought under the provisions of the sterilization law.

Cases in Federal Courts

The attorney general has appeared of counsel in eleven cases in the U. S. district courts. Of these he has succeeded in winning favorable decisions in four cases. In three cases unfavorable decisions were rendered. Four cases are still pending.

Three cases in which the attorney general is counsel of record have been filed in the U. S. circuit court of appeals. Of these cases a favorable decision was rendered in one case, an unfavorable decision in another, and the third is still pending.

Four cases in which the attorney general is counsel of record have been filed in the U. S. supreme court. Of these two have been decided favorably to the state's contentions, one unfavorably, and one is still pending.

SUITS BROUGHT AT REQUEST OF STATE OFFICERS, BOARDS AND COMMISSIONS

A number of suits have been filed by the attorney general at the request of other state executive officers, boards and commis-

sions. Many of these have involved legal questions relating to the duties and powers of such officers and bodies, and frequently the question of the constitutionality of statutes, or the proper construction to be placed on them, has been presented to the courts for decision.

Among these cases have been that of Weaver v. Koehn filed originally in the district court of Lancaster County at the request of the governor and department of trade and commerce, praying for a declaratory judgment to determine the constitutionality of and construe the terms of the provisions of Chapter 33, Laws of 1929, appropriating $260,111.34 to reimburse depositors of insolvent banks. The law was held unconstitutional by the district court and its decision affirmed by the supreme court (231 N. W. 703).

Several cases have been filed to test the validity of and construe the provisions of the law relating to testing of cattle for tuberculosis. One such case is State ex rel Sorensen v. Kistler, appealed to the supreme court from Adams County and reported in 119 Neb. 89. Another case of a similar nature was a suit brought by the state against Lancaster County to recover funds alleged to be due the state under this law. This suit was won and some $1500 recovered for the state.

A number of condemnation cases have been filed for the highway department. A large number of petitions to revoke the licenses of persons licensed to practice the healing arts have been filed and prosecuted at the request of the department of public welfare. Many claims of the board of control against estate's of deceased persons have been filed and prosecuted. A test case to test the validity of the sterilization law has been instituted at the request of the board of control and is now pending in the supreme court. One hundred and forty-three actions for receiverships of failed state banks have been brought on the relation of the attorney general.

A number of highly important investigations of railroad rates have been instituted and conducted by the department before the interstate commerce commission at the request of the state railway commission. These matters include investigations of freight rates

on potatoes, hay, grain, live stock, salt, classification of freight, etc. These matters are still pending before the interstate commerce commission and should the decision of that body be favorable to the contentions of this department it will result in the establishment of freight rates vastly more favorable to the people of Nebraska.

DEFENSE OF SUITS BROUGHT AGAINST THE STATE, ITS OFFICERS AND GOVERNMENTAL AGENCIES

An even greater number of the civil cases handled by the attorney general have been cases where the state or its officers and agents were parties defendant. Many of the most important cases mentioned in this report were of that nature.

Among these cases was that of Abie State Bank v. Weaver, et al, to enjoin collection of bank assessments for the guarantee fund; State ex rel Beatrice Creamery Co. v. Marsh, to enjoin collection of occupation tax on property of a domestic corporation located outside the state and Peterson, Shirley & Gunther v. State, to collect approximately $100,000.00 alleged by plaintiff to be due from the state on certain road contracts. All of these cases were successfully defended in the supreme court.

ACTIONS BROUGHT IN NAME OF THE STATE ON INITIATIVE OF THE ATTORNEY GENERAL

A number of cases were brought on behalf of the state on the initiative of the attorney general. Most of these cases had to do with enforcement of the laws against intoxicating liquor, gambling, lotteries and commercialized vice.

Among these cases is that of State ex rel Sorensen v. Ak-Sar-Ben Exposition Co., reported in 118 Neb. 851, to enjoin pari mutuel betting on horse races. The case of State v. General News Bureau, now pending in the district court of Douglas County was brought by the attorney general to recover a forfeiture from defendant for failure to comply with the laws regulating telegraph and news companies.

Another important case instituted by the attorney general

was in connection with the failure of the Peters Trust Co. of Omaha. In that case the attorney general sought to keep the administration and liquidation of the trust estate in the state courts but was unsuccessful. His activities, however, resulted in uncovering evidence of crimnal activities on the part of certain officers of the company which resulted in the filing of criminal charges, and was generally helpful in conserving the assets of the company to its creditors and stockholders. The two men against whom charges of embezzlement were filed have pleaded guilty and were paroled by the district court of Douglas County on condition that they make restitution.

HELP GIVEN COUNTY ATTORNEYS

While the law contemplates in most cases that the county attorneys shall assist the attorney general when requested to do so rather than the reverse, the department of justice has attempted to cooperate as fully as possible with the county attorneys of the state and, in addition to giving legal advice and written opinions whenever requested, it has also on many occasions assisted in the prosecution or defense of cases in the district and inferior courts when asked to do so by the county attorney. This has been particularly true in prosecutions for violation of the banking laws, and other cases where special skill and experience were required to try the case. In many of these cases the county would have been required to spend large sums for special counsel had it not been for the assistance given by this department.

ESCHEATS

Several escheat cases have been handled by the department. Most important of these was the final disposition of the famous O'Connor case, which resulted in approximately $125,000.00 being paid into the state treasury.

Another escheat case was that of the estate of Frank Znojemsky in the county court of Fillmore County in which the department recovered $5,000 net for the state in addition to costs and expenses.

Other escheat cases are now pending which, if brought to a successful conclusion, will yield several thousand dollars to the state.

LAW ENFORCEMENT

Special mention should be given to the work of the department in enforcing the laws relating to liquor and commercialized vice.

One of the first steps taken by the attorney general after taking office was to cause the closing of eight notorious gambling houses in the city of Omaha. He also caused similar houses to be closed in Lincoln, North Platte and other places.

Another important action was the enjoining of the Ak-Sar-Ben Exposition Company from permitting pari mutuel betting in connection with its horse races. By this action approximately three millions of dollars which are annually lost at the races chiefly by workers and persons of small means have been saved to the people of the city of Omaha and of the state of Nebraska to be used in the legitimate channels of business.

Another activity which is being undertaken is the closing of places where bets are received to be telegraphed to another state or country. Two important suits of this nature are now pending in the federal court.

A drive has been instituted for the elimination of slot machines and similar gambling devices and for the discouragement of lottery and gift enterprises of various kinds frequently innocently adopted to stimulate trade. This has been a campaign of education rather than of criminal prosecution.

In this connection it is noteworthy that pledges have been secured by this department from practically every county fair association in the state that they will not permit gambling or lottery enterprises in any form in connection with their county fairs.

ENFORCEMENT OF LIQUOR LAWS

In addition to the large number of liquor cases handled on appeal to the supreme court, the department has taken an active part

in making enforcement of the liquor laws effective throughout the state. Much information is continually being received by the department concerning violations of the liquor laws, which is always passed on to the state sheriff or to other proper officers for investigation. Many prosecutions of flagrant offenses against the laws have come from information thus received.

In addition the department has frequently assisted county attorneys in the prosecution of liquor violations before the district and inferior courts. Several injunction suits have been brought against habitual offenders including a number of padlocking suits which have resulted in putting a number of such places permanently out of business.

Ouster proceedings were successfully brought against one county sheriff for failure to enforce the liquor laws. Another sheriff resigned and fled the state as a result of investigations of this department of similar complaints.

In addition, the attorney general and his assistants have held consultations and given advice on literally hundreds of occasions with both public officials and private citizens, as well as conducting several investigations, in connection with the enforcement of the liquor and anti-vice laws. What takes place at these conferences is not made public but occasionally, when other methods have failed, pitiless publicity has been used in connection with law enforcement. We have found by experience that this is the most effective way of ridding a state or community of vice. The underworld cannot stand the sunlight of publicity. It can only prosper in darkness.

In connection with law enforcement this department has consistently followed two principles: First, that the attorney general cannot choose which laws he wishes to enforce but that, under his oath, he is obliged to enforce all the laws of the state and nation; second, the laws of the state and nation must be enforced with equal vigor in all communities. When complaints reach this office it cannot send out men to take a census of the community to see whether or not they wish the law enforced. It must enforce all the

laws in all parts of the state with equal impartiality and with equal vigor.

BANK PROSECUTIONS

An important part of the work of the department during the past biennium has been the prosecution of violators of the banking laws as disclosed by investigations of the activities of the guaranty fund commission as well as special investigations of this department. The department has conducted or assisted in more than fifty prosecutions of this nature in the district courts as well as handling a number of such cases on appeal in the supreme court.

ABIE STATE BANK V. WEAVER ET AL

Perhaps the most important single piece of litigation handled by the department during the biennium was the case of Abie State Bank v. Weaver et al which was filed in the district court of Lancaster County during the closing days of December, 1928. In that case 559 state banks joined forces to enjoin the collection of a special assessment of one-half of one per cent of their average daily deposits for the benefit of the depositors guarantee fund. It was urged by the banks that the law is confiscatory and unconstitutional. Trial of the case in the district court consumed several weeks and resulted in a judgment in favor of the banks and enjoining the collection of the assessments. The case was appealed to the supreme court which reversed the judgment of the trial court and declared the guaranty fund law to be constitutional. The banks have carried the case on appeal to the supreme court of the United States where it is now pending. If the decision of our supreme court is there affirmed it will not only validate future actions under the law but will authorize the state to collect some three million dollars from the state banks due under past assessments for the benefit of the guarantee fund.

THE BANKING SITUATION

During the past biennium no problems have been more vexations and difficult of solution, and yet more important to the welfare

of the people of Nebraska than those growing out of the banking situation. In talking to depositors in failed banks it is easy to say that they must be paid in full. All fair-minded men agree that their cause is an exceedingly just one. But sober men with a sense of responsibility ask, "Who shall pay them? How? When? What is an equitable solution of the whole matter?"

The banks should not be relieved of their present legal obligation to help pay the huge debt to the depositors who trusted the failed banks not wisely but too well.

The operation of the guarantee fund law from 1921 up to two years ago made possible an orderly adjustment of the banking situation and made possible the recovery of a good many banks that otherwise would have gone under. Bankers now owning sound banks have told me that they could not have withstood the heavy withdrawals in 1923 because they had so much frozen paper at that time and that the law gave them sufficient time to earn money, realize on frozen assets, charge off losses. and get their banks into good shape. That this stabilization from this confidence in the guarantee fund was real is indicated by the consistent increase in deposits that continued for many years in spite of the failing of many banks.

The banks did benefit in many ways. For approximately twenty years, every state bank in Nebraska had the use of all the state, county, city, village, township, school district and other public funds of Nebraska, without giving bonds. The surety company rates on public depository banks bonds average higher than the present guarantee fund assessments.

The banks have received other valuable favors from the legislature to compensate them in part for their contributions to the guarantee fund:

1. The 1921 bank monopoly law providing that no new bank charter shall be issued except upon proof of public necessity.

2. The 1923 law reducing maximum interest rates on time deposits from 5 per cent to 4.

3. The law taxing banks on basis of only 8 mills on dollar valuation, while farm and city property is taxed from two to five times as much.

George W. Woods, prominent banker, and for many years an official in the state bankers' association, and now state banking commissioner, testified in the Abie State Bank case that the guarantee fund law was responsibe for $100,000,000 of deposits in the state banks.

While the banks should be required to help pay the guarantee fund deficit, nevertheless, they are not able and it would be unfair to ask them to pay all of it.

The total capital of all the present going banks in Nebraska is approximately sixteen million dollars. The guarantee fund deficit is several million more. Obviously, the bank goose cannot in one day lay its weight in gold. If the banks never paid a dividend to their stockholders, it would still take many long years, a generation, before the depositors would be paid, and then without interest. Payment too long deferred is no payment to many people. Let us face the brutal fact that the banks are not able to shoulder alone the burden of paying the depositors.

It is an ancient rule of law that those who come into court to secure equity must offer to do equity. We need to remember that the crooked and incompetent bankers who caused so many failures are out of our reach. The guarantee fund assessments will not touch them. The men running banks today have survived the terrific financial tornado that started to blow in the fall of 1920. These men are not responsible for a single cent of the deficit in the guarantee fund; on the contrary, by saving their banks they have prevented the deficit from being twice what it now is. Do not think these men have not suffered. They have taken terrific losses because of the deflation in values. Many of them have put their entire personal fortunes into their banks to save them. Some of the bravest heroes of the last ten years can be found among the bankers who have pulled their institution through the storm.

Because of the promises that they made in advertisements and

otherwise to depositors generally and which were relied upon, I think we must insist on their help in reimbursing depositors in failed banks. But we must be fair. We must not make the burden so heavy that they cannot operate good banks. To do so would not only be unjust but endanger present depositors.

The now existing state banks collectively during the last ten years have paid into the guarantee fund over ten million dollars. We are going to make them pay more. Ought we not as citizens to show our appreciation of this by our support and encouragement? They have helped us. Let us help them with our business. The banks which have stood the battle for ten years are worthy of support.

In my opinion the state of Nebraska has a moral obligation to the depositors. The state through the legislature called it the "State Guarantee Fund" and thereby misled thousands of people into believing that the state of Nebraska was back of the fund. Up until recently there was not proper supervision and examination of banks. There were not enough competent examiners and the recommendations of the examiners were not always carried out. Utterly incompetent bankers were allowed to take the money of the people. Up to 1921 bank charters were granted wholesale. If in connection with the passing of the guarantee fund law there had also been passed a law limiting charters, and if from that time on there had been stringent examination and strict supervision of the banks, there probably would be little or no deficit in the guarantee fund today.

But that is not all. The guarantee fund commission—a branch of the state—operated for a period of time over two hundred banks. These state operated banks not only accepted but in many cases solicited new deposits. Many of their agents said to depositors that now that the state is in control your deposit is absolutely secure. It now appears that deposits in an amount of between two and three million dollars were placed in these state operated banks and remained there when the banks were finally closed. Can anyone say that the state is not under the highest possible moral obli-

gation to these depositors? Shall it be said that the State of Nebraska through its agents misled and defrauded its own citizens?

We are proud of our new state capitol. It will cost not less than ten million dollars. Let us help the depositors and have a second great thing to be proud of as a state. The depositors in Iowa lost over a hundred million dollars, in South Dakota over sixty million dollars, and in other states similar amounts. Suppose in Nebraska we can bring about the payment of the depositors. What a really truly glorious story that would be to tell and re-tell during the years to come! How proud we would always be to say that in only one state in the Union, Nebraska, the depositors were paid!

OPINIONS AND CONSULTATIONS

During the year 1929 the department issued 2,328 written opinions on legal questions and during the year 1930 it issued 2,463 such opinions, making a total of 4,791 opinions for the biennium.

This is an average of eight formal written opinions on legal questions, requiring investigation and research, often for days and even weeks, which was issued by the department every working day of the biennium.

Many of these opinions were written to state officials but an even larger number to county, township and school officers and to private citizens.

In this connection it should be said that opinions to private citizens were not given unless their questions involved in some way their relations to the government. An unfortunate idea prevails that the department of justice is a sort of dispensary of free legal aid and it has been necessary to refuse hundreds of requests for opinions with the suggestions that a private attorney be consulted, because the question asked related purely to private matters.

In addition to the formal written opinions issued by the department an even greater number of verbal opinions have been

given in the course of the innumerable consultations which occur daily with state and other officials and private citizens.

It should also be mentioned that the written opinions noted above do not include the vast mass of correspondence on routine affairs and other matters which do not involve the giving of opinions on questions of law.

INVESTIGATIONS AND OTHER ACTIVITIES

A number of investigations have been conducted by the department. Among the most important have been those based on complaints that certain chain grocery stores were guilty of unfair competition; investigations of a number of creamery and dairy companies based on complaints that they were violating the anti-discrimination law; and numerous investigations of the affairs of failed state banks.

A number of prosecutions have been brought as a result of these investigations, and a suit has been brought and is now pending against certain creamery companies in the district court of Pierce County to determine the right of creamery companies to pay a bonus in addition to the regular price for cream and butter fat in localities where cooperative creameries are being operated.

An important duty of the attorney general is his service as a member of the pardon board which has the sole power in this state to pardon or parole or commute the sentences of prisoners of the state. The board meets once each month to hear the applications of prisoners. The attorney general by reason of his legal training and also by reason of the fact that, in many cases, his department has handled the prosecution of the case in the courts, is perhaps peculiarly fitted to render valuable service to the board in the performance of its duties. In this connection he recommends to the legislature the abolishment of the death penalty. He believes, however, that where prisoners have been fairly tried and duly convicted by a jury and sentenced by the court that the board of pardons should not annul or modify such sentence except in cases where justice and the public welfare clearly require it.

The attorney general is also a member of the board of educational lands and funds where, as legal adviser to the board, his services ought to be peculiary valuable.

Other activities of the department have included the filing and prosecution of disbarment proceedings against certain attorneys; examination of requisition papers for return of fugitives from justice; examination of title to lands purchased by the state; preparation of legal forms for use of state and county officers; drawing and passing upon contracts to be entered into by agencies of the state and its political subdivisions.

During sessions of the legislature the attorney general and his assistants give much of their time to helping members in preparation of bills and of legal opinions in connection therewith. Members of the legislature are welcome to ask for such assistance as they wish.

While not required by statute, the attorney general as a matter of courtesy has prepared numerous ordinances and resolutions for cities and towns on special subjects. At the request of the league of Nebraska municipalities, made up of two hundred cities and towns, he prepared an electric light and power bill which was submitted under the Initiative to a vote of the people last November. The measure carried by a vote of 240,579 to 89,205, a majority of 151,374. This new power bill provides briefly as follows with reference to cities and towns owning electric light and power plants:

A. That they may extend their electric light and power plants and lines beyond their boundaries for the purpose of serving rural communities and other municipalities, provided that the cost thereof must be paid out of the net earnings of the plant or lines and not by taxes or bonds.

B. That they may connect and interconnect their power plants and lines with other publicly-owned or operated power plants and lines.

C. That they may pledge the net earnings and profits of their electric light and power plants, lines or systems, for the payment of the cost thereof.

D. That they may not sell or alienate their power plant, distribution system, or transmission lines to private persons or corporations without a favorable vote of sixty per cent of the voters, and that no such sale or alienation shall be effective until all the facts concerning the plant sold shall be filed with the state department of public works, and that no private person or corporation may, in order to promote and bring about the sale or alienation of any such publicly-owned power plant, system or lines, pay out or expend an amount in excess of three thousand dollars nor in any event in excess of a sum equal in number of dollars to the number of voters in the municipality or public power district affected.

On the invitation of United States Senator Lynn Frazier, chairman of the committee on Indian affairs, the attorney general sat with that committee when it was in Nebraska to investigate the conditions surrounding Indians in this state. At the request of Senator G. P. Nye, chairman of the special senate committee on campaign expenditures and practices, the attorney general sat also with that committee at two of its hearings in Nebraska to advise on Nebraska election laws.

During the past year congress passed and President Hoover affirmed a law providing for the granting of a franchise to a board of trustees composed of the mayors of Council Bluffs and Omaha, one citizen from each of said towns, and myself as attorney general, for the purpose of designing and building a bridge across the Missouri River at the lower end of Farnam Street, Omaha. The board has held a number of meetings and discussed plans.

In the suit growing out of the protest filed against the candidacy of George W. Norris of Broken Bow for the nomination for United States senator on the republican ticket, the attorney general prepared and filed a brief as a friend of the court and also argued the case in court. The supreme court adopted the proposition urged by the attorney general that a nomination in the primary must be actually filed in the office of the secretary of state within the time fixed by statute in order to be valid.

APPROPRIATIONS FOR DEPARTMENT OF JUSTICE

It is noteworthy that, although the work of this department

increases noticeably each year, and each session of the legislature adds many new and onerous duties to those already required to be performed by it, yet the appropriations for the department have been diminished rather than increased during the past ten years. The rapid growth and development of the state compels constant change and reorganization of the state government which necessarily becomes more specialized and complex as the volume of its work increases.

The automobile, for example, has directly and indirectly added tremendously to the burden of government within the past decade or two. The system of licensing cars requires a separate bureau at the seat of government and an army of workers over the state. The licensing of drivers required by the 1929 legislature has caused an added burden. The building of good roads suitable for automobile travel has made necessary the creation of a separate branch of the state executive department. The imposition of a gasoline tax has made necessary the creation of a bureau to collect the tax. The establishment of commercial bus and truck lines as common carriers has created many new problems and burdens.

The same could be said in a general way regarding the many laws requiring practitioners of the healing arts, barbers, cosmetologists, etc., to secure annual licenses, be subject to inspection and to general regulation. It could be said of the laws prohibiting the manufacture and sale of intoxicating liquors; of the laws regulating banking, insurance and corporations in general, including the blue sky laws; of our pure food laws and laws against unfair trade practices; of our workmen's compensation laws; of our laws pertaining to elections, particularly those relating to the direct primary and to the initiative and referendum.

All these laws and many more that might be mentioned are of comparatively recent origin, and were entirely unknown in most cases thirty years ago, yet today their enforcement constitutes a great part of the work of our government. Nowhere has the burden of enforcing these many laws fallen more heavily than on the department of justice.

It is worthy of remark, therefore, that while our government has been constantly assuming new burdens and obligations and creating new departments, boards, commissions and offices to perform them, the department of justice has, during the biennium now closing performed the work required of it on a considerably smaller appropriation than it received from the legislature ten years ago.

The appropriations for the past ten years have been as follows:

1919-1921	$102,100.00
1921-1923	122,500.00
1923-1925	107,500.00
1925-1927	97,375.00
1927-1929	87,375.00
1929-1931	97,375.00

Concerning the appropriation for 1927-1929 it should be said that in addition to the regular appropriation a special appropriation of $7,500 was made to pay costs incurred by the attorney general's office in connection with railroad taxation cases.

It is interesting in this connection to compare the appropriation of our state to its department of justice with the appropriations made by neighboring states to the attorney general's office of their respective states for the past biennium. An examination of their session laws reveals the fact that the states below listed appropriated to that office for the last biennium the following sums:

South Dakota	$ 84,895.00
North Dakota	93,700.00
Nebraska	97,375.00
Kansas	99,800.00
Colorado	103,300.17
Wisconsin	140,000.00
Oklahoma	147,900.00
Missouri	178,100.00
Iowa	197,900.00
Minnesota	295,650.00

It should be noted that the appropriation of Kansas for the

past biennium does not include a considerable fund already on hand from previous appropriations which was re-appropriated.

It is also only fair to state that the Minnesota appropriation includes an item of $48,425.00 to the criminal apprehension bureau, whose functions apparently correspond to those of our state sheriff's office.

It will be seen from the above list that the expense of maintaining the attorney general's office in this state is quite modest compared with that of most of our neighboring states although the work required of the department in other states is little if any greater.

In spite of the constantly increasing work of this office, however, no increase in the appropriation for the next biennium is being asked.

FUNDS RECOVERED

During the biennium just ended the department has recovered from judgments a total sum of $23,786.61 in cash and a further sum of $1,689.90 in court costs, all of which has been paid over to the treasurer as required by law.

The appropriation to the department to pay costs and judgments during the biennium was $5,000, so that the net cost to the state on this item, when the amount of costs recovered is offset against it, is but $3310.10. The attorney general urges that a law be passed providing that court cost recovered by the department be kept in a separate revolving fund to be used for the purpose of paying costs and judgmnts instead of turning these costs over to the general fund of the state as is now the practice.

OPINIONS CONTAINED IN THIS REPORT

Following the list of cases handled by the department will be found a compilation of opinions issued by the department during the past biennium. It includes, of course, only a very small part of the total number of opinions given during that time and they are selected because of their unusual importance or general public interest.

CONCLUSION

In concluding this report I wish to express my deep appreciation of the loyal cooperation and support given me by my co-workers and assistants in the department. Whatever has been accomplished has been due to the splendid team work and unfailing industry on the part of every worker in the department. I have selected my assistants and clerical and stenographic help solely on the basis of their ability to perform the work required of them and without regard to any political "pull" or other influence of any kind, and I believe the achievements of the department during the biennium have amply justified my selection. Whatever of credit may be due is due not to me personally but to every member and employee of the department who have labored together in a spirit of harmonious service and loyalty to their respective trusts which has been intensely gratifying to me.

No one has said and no one can say that our office has ever twisted opinions to suit the wish of any person or corporation. To our office come the high and the low, the rich and the poor, the educated and the unschooled, and to the best of our ability we treat them all fairly and with courtesy. There are no underground wires from any outside place to my office in the state capitol. We treat all Nebraska citizens alike regardless of their wealth, social position, color, nationality, or political standing. We have no sympathy or patience with crooks and grafters, whether high or low, but we do everything in our power to help all honest business.

We believe that the people of Nebraska who elected us and pay our salary are entitled to know what goes on in our office. We think that public business should be carried on in the open and without secrecy. Therefore, when newspaper men or others ask for copies of opinions or briefs prepared by our office, we grant their request as a matter of course. This is what our critics refer to as "trying lawsuits in the press." As a matter of fact very few of the hundreds of opinions given out by us are of any interest to the press or ever used by the newspapers.

There has been much bitterness among some people because

we stopped betting at the Ak-Sar-Ben races. This seems to be the source of a great deal of the opposition to me. But the law made it my duty to suppress gambling. Here was gambling on a gigantic scale. Should I be a party to punishing little gamblers and letting the big ones go? Must I be punished and crucified politically as an object lesson to public officers who dare to enforce the laws?

Public officers get much abuse and criticism. But it is not all brickbats. I do not believe there is a church organization in the state of any consequence but what has passed resolutions commending me on my attitude on law enforcement. Hundreds of business men in person and by letter have thanked me for what I have done to assist legitimate business and to put out of business crooks and grafters. Farm and labor organizations have been especially kind to me and have stood back of me in my work. That kind of help and cooperation makes serving the state a great pleasure.

Respectfully submitted,

C. A. SORENSEN,
Attorney General.

CASES IN SUPREME COURT OF NEBRASKA FROM JANUARY 4, 1929 TO DECEMBER 15, 1930, DATE OF THIS REPORT, IN WHICH THE ATTORNEY GENERAL APPEARS AS COUNSEL

Abie State Bank v. Weaver, et al., No. 27070, Lancaster County. Banking Reversed—227 N. W. 922, 119 Neb. 153. Appealed to Supreme Court of United States.

Ak-Sar-Ben Exposition Company v. Sorensen, et al, No. 27172, Douglas County. Injunction. Reversed and cause retained to await final judgment in State v. Ak-Sar-Ben Exposition Co., No. 27083—229 N. W. 13, 119 Neb. 358.

Allen v. State, No. 26844, Otoe County. Liquor. Affirmed without opinion.

Allen v. State, No. 27755, Otoe County. Liquor. Pending.

American Telephone & Telegraph Company v. State Board of Equalization, No. 27184. Taxation. Order of board vacated—227 N. W. 455, 119 Neb. 142.

Babcock v. State, No. 26780, Otoe County. Receiving and buying stolen property. Affirmed without opinion.

Blanchard v. State, No. 26767, Dawes County. Rape. Affirmed—223 N. W. 808, 118 Neb. 149.

Bloomenkamp v. State, No. 26958, Keith County. Misdemeanor. Affirmed without opinion on authority of 14 Neb. 4 and 221 N. W. 708.

Bodeman v. State, No. 27021, Hayes County. Rape. Affirmed—227 N. W. 954, 119 Neb. 843.

Bohlke v. State, No. 26949, Adams County. Burglary and larceny. Affirmed—228 N. W. 936, 119 Neb. 861.

Bourne v. State, No. 26644, Dawes County. Murder second degree. Affirmed—226 N. W. 784, 118 Neb. 862.

Broquet v. State, No. 26533, Furnas County. Murder first degree. Affirmed, sentence reduced—223 N. W. 464, 118 Neb. 31.

Brott v. Fenton, No. 27616, Lancaster County. Habeas Corpus. Pending.

Carmichael v. State, No. 26596, Jefferson County. Perjury. Affirmed without opinion.

Childs v. State, No. 27369, Douglas County. Murder second degree. Reversed—232 N. W. 575.

Clayton v. Board of Examiners, No. 27562, Gage County. Sterilization. Pending.

Clinton v. State, No. 27526, Otoe County. Bank robbery. Affirmed.

Cooper v. State, No. 27372, Saline County. Forgery. Argued and submitted.

County of Burt v. State Board of Equalization, No. 27706. Taxation. Affirmed.

Coxbill v. State, No. 26703, Clay County. Liquor. Affirmed without opinion.

Crable v. State, No. 27089, Adams County. Liquor. Affirmed—229 N. W. 940, 119 Neb. 870.

Craig v. State, No. 27131, Douglas County. Larceny. Affirmed—230 N. W. 951, 119 Neb. 877.

Cunningham v. State, No. 26862, Sioux County. Liquor. Affirmed without opinion.

Darling v. Fenton, No. 27785, Lancaster County. Habeas corpus. Pending.

Davis v. State, No. 26815, Fillmore County. Embezzlement. Reversed—226 N. W. 449, 118 Neb. 828.

Davis v. State, No. 27775, Fillmore County. Embezzlement. Pending.

Dawson County Irrigation Co. v. McMullen, et al., No. 27264, Dawson County. Injunction. Affirmed.

Dixon v. State, No. 27252, Douglas County. Keeping gambling house. Affirmed as modified—228 N. W. 938, 119 Neb. 299.

Dobbs v. State, No. 26575, Pierce County. Forgery. Affirmed for want of briefs.

Dodson v. State, No. 26950, Adams County. Rape. Affirmed—228 N. W. 859, 119 Neb. 340.

Drawbridge v. State, No. 26799, Platte County. Liquor. Affirmed without opinion.

Dwyer v. State, No. 26661, Merrick County. Liquor. Affirmed for want of briefs.

Eckhardt v. State, No. 26610, Kearney County. Liquor. Affirmed without opinion.

Eidenmiller v. Department of Public Works, No. 27665, Holt County. Workmen's Compensation. Reversed with direction—233 N. W. 447.

Elmen v. State Board of Equalization and Assessment, et al, No. 27412, original action. Equitable injunctive relief. Relief denied—231 N. W. 772.

Fetty v. State, No. 26589, Webster County. Blackmail. Reversed—223 N. W. 955, 118 Neb. 169.

Fetty v. State, No. 27249, Webster County. Blackmail. Reversed—230 N. W. 440, 119 Neb. 619.

Fetty v. State, No. 27724, Webster County. Blackmail. Pending.

Flanders v. Kavanaugh, No. 27278, Platte County. Habeas corpus. Affirmed.

Freburg v. State, No. 27576, Phelps County. Liquor. Affirmed.

Foyt v. State, No. 27383, Nemaha County. Rape. Affirmed—231 N. W. 956.

Galloway v. Wolfe, et al, No. 26393, Saunders County. Sunday dancing. Reversed—223 N. W. 1, 117 Neb. 824.

Garrett v. State, No. 26591, Box Butte County. Murder first degree. Reversed—224 N. W. 860, 118 Neb. 373.

Geest v. State, No. 26855, Douglas County. Selling aspirin in grocery store. Affirmed—225 N. W. 709, 118 Neb. 562.

Gonzalez v. State, No. 27038, Lancaster County. Contempt of court. Reversed—226 N. W. 801, 119 Neb. 13.

Goos v. Brocks, et al, No. 26730, Adams County. Partition. Reversed with direction—223 N. W. 13, 117 Neb. 750.

Graeme and Hamilton v. State No. 26664, Scotts Bluff County. Grand larceny. Reversed—223 N. W. 673, 118 Neb. 113.

Graf v. State, No. 26563, Gage County. False representation. Reversed—225 N. W. 466, 118 Neb. 485.

Griess v. State, No. 26387, Clay County. Embezzlement. Reversed—222 N. W. 628, 117 Neb. 719.

Grosh nee Cady v. State, No. 26877, Lincoln County. Liquor. Affirmed—225 N. W. 479, 118 Neb. 517.

Halte v. State, No. 26900, Adams County. Liquor. Affirmed without opinion.

Haney v. State, No. 27084, Platte County. Burglary. Modified and affirmed—228 N. W. 939, 119 Neb. 862.

Harmer v. Miller, et al, No. 27092, Lancaster County. Habeas corpus. Dismissed.

Harmer v. State, No. 27553, Otoe County. Chicken stealing. Reversed—232 N. W. 614.

Hickman v. Fenton, No. 27423, Lancaster County. Habeas corpus. Affirmed—231 N. W. 510.

Hiles v. State, No. 27502, Dawson County. Theft. Argued and submitted.

Hinds v. State, No. 27772, Gage County. Making false entries. Pending.

Hogoboom v. State, No. 27365, Frontier County. Embezzlement. Argued and submitted.

Huckett v. State, No. 27771, Gage County. Arson. Pending.

Hunter v. State, No. 26898, Lincoln County. Liquor. Affirmed—231 N. W. 512.

Jennings v. State, No. 27638, Johnson County. Rape. Pending.

Johnson v. State, No. 26935, Nemaha County. Embezzlement. Affirmed in part—228 N. W. 253, 119 Neb. 217.

Johnson v. State, No. 27373, Hamilton County. Liquor. Affirmed—231 N. W. 956.

Kent v. State, No. 26828, Box Butte County. Destruction and damage by birds. Affirmed—225 N. W. 672, 118 Neb. 501.

Kerr v. State, No. 27268, Harlan County. Incest. Affirmed—229 N. W. 940, 119 Neb. 871.

King v. Fenton, No. 27257, Lancaster County. Habeas corpus. Affirmed—229 N. W. 941, 119 Neb. 872.

Kunzelman v. State, No. 26948, Adams County. Burglary and larceny. Affirmed—228 N. W. 939, 119 Neb. 860.

Lane v. State, No. 27515, Douglas County. Barbering without license. Reversed—232 N. W. 96.

Lahners v. State, No. 26541, Thayer County. No fund check. Affirmed—223 N. W. 951, 118 Neb. 184.

Lechliter v. State, No. 27468, Nemaha County. Rape. Affirmed.

Lincoln Telephone & Telegraph Co. v. Barth, No. 27730. Appeal from order of Railway Commission authorizing installation of automatic telephone service and approval of rates therefor at Seward. Pending.

Lincoln Telephone and Telegraph Co. v. State Board of Equalization, No. 27180. Taxation. Order of board vacated—227 N. W. 454, 119 Neb. 137.

Limmerick v. State, No. 27179, Douglas County. Automobile stealing. Argued and submitted.

Liske v. State, No. 27393, Platte County. Liquor. Affirmed—230 N. W. 503, 119 Neb. 640.

Lynn v. County of Kearney, No. 27642, Kearney County. Declaratory judgment. Pending.

Lytle v. State, No. 27582, Kearney County. Bank robbery. Affirmed.

McNeel v. State, et al, No. 27558, Lincoln County. Breach of contract. Pending.

Marguardt v. State, No. 27415, Hitchcock County. Forgery. Dismissed.

Matters v. State, No. 27488, Douglas County. Embezzlement and larceny. Affirmed.

Mehrens v. Greenleaf, et al, No. 27124, Douglas County. Injunction. Reversed—227 N. W. 325, 119 Neb. 82.

Melkes v. State, No. 27493, Sarpy County. Manslaughter. Dismissed.

Mercer v. Fenton, No. 27529, Lancaster County. Habeas corpus. Reversed.

Miller v. McLaughlin, et al, No. 26612, Lancaster County. Injunction. Reversed—224 N. W. 18, 118 Neb. 174. United States Supreme Court affirmed judgment of Supreme Court of Nebraska.

Morton v. State, No. 27519, Scottsbluff County. Embezzlement. Argued and submitted.

Murray v. State, No. 26864, Otoe County. Forgery. Affirmed—226 N. W. 793, 119 Neb. 16.

Myers v. Fenton, No. 27779, Lancaster County. Habeas corpus. Pending.

Neiden v. State, No. 27639, Lancaster County. Receiving stolen goods. Pending.

Nelson v. State, No. 26778, Harlan County. Liquor. Affirmed—226 N. W. 438, 118 Neb. 812.

Nelson v. State, No. 27782, Pawnee County. Selling mortgaged property. Pending.

Nine Mile Irrigation District v. State, No. 26775, Scotts Bluff County. Damages. Affirmed—225 N. W. 679, 118 Neb. 522.

Northern Nebraska Power Co. v. County of Holt, No. 27543, Holt County. Taxation. Pending.

Northwestern Bell Telephone Co. v. State Board of Equalization, No. 27181. Taxation. Order of board vacated—227 N. W. 452, 119 Neb. 138.

Norton v. State, No. 27297, Dawson County. Hog stealing. Affirmed—230 N. W. 438, 119 Neb. 588.

Omaha Armory Building Co. v. State, et al, No. 26872, Lancaster County. Lease. Affirmed—226 N. W. 911, 119 Neb. 29.

Omaha Grain Exchange v. Spillman, No. 26831, Lancaster County. Injunction, constitutionality of Chapt. 8, Laws of 1927. Affirmed—226 N W. 452, 118 Neb. 729.

O'Neil v. State, No. 26793, Jefferson County. Murder first degree. Reversed—224 N. W. 855, 118 Neb. 360.

Paige and Chrisman v. State, No. 27759, Garden County. Liquor. Pending.

Palmer v. State, No. 26956, Adams County. Chicken stealing. Affirmed—227 N. W. 956, 119 Neb. 852.

Pandolfo v. State, No. 27466, Dundy County. Blue Sky violation. Pending.

Parmenter v. State, No. 27134, original action. Quo warranto. Dismissed.

Peckham v. State, No. 26747, Johnson County. Child stealing. Reversed—224 N. W. 318, 118 Neb. 265.

Pelander v. State, No. 26732, Phelps County. Liquor. Affirmed without opinion.

Pelander v. State, No. 26847, Phelps County. Liquor. Affirmed without opinion.

Pembrook v. State, No. 26389, Clay County. Murder second degree. Reversed—222 N. W. 956, 117 Neb. 759.

Pembrook v. State, No. 27088, Clay County. Manslaughter. Affirmed as modified—229 N. W. 271, 119 Neb. 417.

Penn v. State, No. 26977, Merrick County. Murder first degree. Affirmed—227 N. W. 314, 119 Neb. 95.

Petersen, et al. v. Beal, et al, No. 27674, Douglas County. Constitutionality of taxi-cab law. Pending.

Peterson v. Department of Public Works, et al, No. 27472, Lancaster County. Foreign truck license. Argued and submitted.

Peterson, Shirley & Gunther v. State, No. 27343, Lancaster County. Money due on contract. Affirmed—232 N. W. 94.

Pilger v. State, No. 27497, Pierce County. Embezzlement. Argued and submitted.

Reed v. State, No. 26861, Lancaster County. Coram nobis. Affirmed —227 N. W. 957, 119 Neb. 848.

Reems v. State, No. 27564, Lancaster County. Liquor. Affirmed.

Rego, etc. v. State, No. 27419, Lancaster County. Robbery. Affirmed.

Rice v. State, No. 27390, Lancaster County. Abortion. Pending.

Ridenour v. State, No. 27259, Phelps County. Chicken stealing. Reversed—230 N. W. 587, 119 Neb. 688.

Roeder v. State, No. 26939, Adams County. Arson. Affirmed—227 N. W. 446, 119 Neb. 116.

Salistean v. Fenton, No. 27690, Lancaster County. Habeas corpus. Pending.

Schmidt v. State, No. 26788, Lancaster County. Liquor. Affirmed for want of briefs.

Scott v. State, No. 27541, Lancaster County. Burglary. Pending.

Shear v. State, No. 26309, Dodge County. Damages to highway. (test case on suits authorized by legislature). Affirmed—223 N. W. 130, 117 Neb. 865.

Sherman v. State, No. 26724, Dawes County. Murder first degree. Affirmed—223 N. W. 645, 118 Neb. 84.

Shinafelt v. State, No. 27019, Hayes County. Rape. Affirmed—227 N. W. 958, 119 Neb. 842.

Shinafelt v. State, No. 27020, Hayes County. Rape. Affirmed—227 N. W. 958, 119 Neb. 842.

Shinley v. State, No. 27595, Frontier County. Liquor. Affirmed.

Shirley v. County of Harlan, et al, No. 26235, Harlan County. Constitutionality of Chapters 56 and 185, Session Laws, 1927. Reversed—223 N. W. 284, 117 Neb. 846.

Sorensen, et al v. Ak-Sar-Ben Exposition Co., No. 27083, original action. Injunction. Preliminary injunction granted—226 N. W. 705, 118 Neb. 851.

Sparks and Reams v. State, No. 26992, Franklin County. Larceny. Affirmed—227 N. W. 958, 119 Neb. 844.

Spearman v. State, No. 27563, Morrill County. Making false entries. Pending.

Stanton County, et al v. State Board of Equalization and Assessment, No. 27178. Taxation. Order of board vacated—227 N. W. 454, 119 Neb. 136.

State v. Kastle, No. 27624, Dodge County. State's exceptions. Argued and submitted.

State, ex rel. Beatrice Creamery Company v. Marsh, No. 27267, Lancaster County. Mandamus. Reversed—227 N. W. 926, 119 Neb. 197. Appealed to Supreme Court of United States. Dismissed for want of substantial Federal question.

State, ex rel. Case Threshing Machine Co. v. Marsh, No. 26821, Lancaster County. Occupation tax. Affirmed—223 N. W. 126, 117 Neb. 832.

State, ex rel. Central Realty & Investment Co. v. McMullen, No. 27187, Lancaster County. Mandamus. Reversed with directions—230 N. W. 677, 119 Neb. 739.

State, ex rel. Garton v. Fulton, No. 26565, Fillmore County. Mandamus. Reversed—225 N. W. 28, 118 Neb. 400.

State, ex rel. Oleson v. Graunke, et al, No. 27334, Cuming County. Mandamus, drivers license. Affirmed—229 N. W. 329, 119 Neb. 440.

State, ex rel. Smith v. Marsh, No. 27643, original action. Judgment for relator.

State, ex rel. Sorensen v. General News Bureau, No. 27379, original action. Quo warranto. Pending.

State, ex rel. Sorensen v. Kistler, No. 26954, Adams County. Injunction, tuberculin test. Reversed with directions—227 N. W. 319, 119 Neb. 89.

State, ex rel. Sorensen v. Knudtsen, No. 27530, Cedar County. Injunction, tuberculin test. Pending.

State, ex rel. Sorensen v. Lake, No. 27634, Douglas County. Revocation of license to practice medicine. Pending.

State, ex rel. Sorensen v. Swanson, No. 27353, original action. Quo warranto. Judgment of ouster.

State, ex rel. Spillman v. Interstate Power Co., et al, No. 26291, Cedar County. Injunction, anti-discrimination. Affirmed—226 N. W. 427, 118 Neb. 756.

State, ex rel. Spillman v. Priest, No. 26159. Disbarment—223 N. W. 635, 118 Neb. 47.

State, ex rel. Spillman v. Splittgerber, No. 27060, Wayne County. Bovine tuberculin test. Affirmed—229 N. W. 332, 119 Neb. 436.

Stumpff v. State, No. 27632, Merrick County. Liquor. Affirmed.

Sulley v State, No. 27293, Douglas County. Highway robbery. Reversed—230 N. W. 846, 119 Neb. 783.

Swartz v. State, No. 26827, Douglas County. Murder first degree. Affirmed—225 N. W. 766, 118 Neb. 591.

Tappan v. State, No. 26720, Logan County. Liquor. Affirmed without opinion.

Trimble v. State, No. 26749, Richardson County. Robbery. Affirmed --224 N. W. 274, 118 Neb. 267.

Trobough v. State, No. 26967, Adams County. Murder second degree. Reversed—227 N. W. 443, 119 Neb. 128.

Trobough v. State, No. 27469, Adams County. Murder first degree. Reversed—233 N. W. 452.

Von Farson v. State, No. 26562, Nemaha County. Intent to wound. Affirmed without opinion.

Wakeley v. State, No. 26335, Douglas County. Forgery. Reversed—225 N. W. 42, 118 Neb. 346.

Weaver v. Koehn, et al, No. 27424, Lancaster County. Declaratory judgment. Affirmed—231 N. W. 703.

Wenzel v. Griffith, No. 27153, Gage County. Habeas corpus. Affirmed—230 N. W. 959, 119 Neb. 882.

West and Lacey v. State, No. 27300, Gosper County. Grand larceny. Reversed—230 N. W. 504, 119 Neb. 633.

Westbrook v. State, No. 27525, Otoe County. Receiving and accepting deposit in insolvent bank. Pending.

White v. State, No. 27571, McPherson County. Liquor. Affirmed.

Wilcox v. State, No. 27207, Furnas County. Liquor. Affirmed—229 N. W. 269, 119 Neb. 422.

Wiles v. Department of Public Works, No. 27548, Cass County. Damages. Pending.

Williams v. State, No. 26741, Nance County. Unlawful practice of medicine. Reversed—224 N. W. 286, 118 Neb. 281.

Wilson v. State, No. 27361, Sheridan County. Murder. Affirmed—233 N. W. 461.

CASES BEFORE THE COMPENSATION COMMISSIONER FROM JANUARY 4, 1929 TO DECEMBER 15, 1930, DATE OF THIS REPORT, IN WHICH THE ATTORNEY GENERAL APPEARS AS COUNSEL.

Allan v. State. Injuries. Pending.

Bishop v. Department of Public Works. Injuries. Judgment for plaintiff.

Caves v. National Guard. Fatal injuries. Pending.

Dinnell v. Highway Department. Injuries. Dismissed.

Eidenmiller v. Department of Public Works. Injuries. Judgment for plaintiff. Compensation allowed by District Court, Holt County. Reversed by Nebraska Supreme Court.

Freeman v. Department of Public Works. Injuries. Award made.

Glover v. Capital Commission. Injuries. Award made. Decree for plaintiff in District Court, Lancaster County.

Grabenschroer v. National Guard. Injuries. Dismissed.

HEARING BEFORE THE DEPARTMENT OF PUBLIC WELFARE FROM JANUARY 4, 1929 TO DECEMBER 15, 1930, DATE OF THIS REPORT, IN WHICH THE ATTORNEY GENERAL APPEARS AS COUNSEL

Clayton, In re. Sterilization (test case). Hearing before Board of Mental Defectives. Order of sterilization. Order of board affirmed by Gage County District Court. Pending in Nebraska Supreme Court.

State v. Amick. Revocation of license to practice dentistry. Pending.

State v. Lake. Revocation of license to practice medicine. License suspended. Order of department affirmed by Douglas County District Court. Pending in Nebraska Supreme Court.

State v. Rice. Revocation of certificate to practice barbering. Revoked.

State v. Smith. Revocation of license to practice medicine. License revoked. Order of department reversed by Furnas County District Court.

State v. Stone. Revocation of license to practice medicine. Probation.

State v. Thompson. Revocation of license to practice medicine. Settled.

State v. Wagner. Revocation of license to practice medicine. License revoked.

State v. Williams. Revocation of license to practice medicine. Award for defendant.

CASES IN MUNICIPAL COURT FROM JANUARY 4, 1929 TO DECEMBER 15, 1930, DATE OF THIS REPORT, IN WHICH THE ATTORNEY GENERAL APPEARS AS COUNSEL

State v. Mulhall. Omaha. Unlawful use of co-operative name. Guilty.

State v. Robinson. Lincoln. Lottery. Acquittal.

CASES IN COUNTY COURTS OF NEBRASKA FROM JANUARY 4, 1929 TO DECEMBER 15, 1930, DATE OF THIS REPORT IN WHICH THE ATTORNEY GENERAL APPEARS AS COUNSEL

Appropriation of land for right-of-way, known as Projects Nos. 621-A and 621-B, In Matter of. Lancaster County. Condemnation. Pending as to Dehart and English.

Department of Trade and Commerce v. Aurora Business College. Hamilton County. Additional fire escape. Settled and dismissed.

Dougroff, Re Estate of. Dawes county. Escheat. Pending.

Mincer v. Chapman. York County. Habeas corpus. Writ granted.

Moore v. Chapman. York County. Habeas corpus. Writ granted. Pending in district court.

Nichols, Re Estate of. Wayne County. Escheat, intervention. Dismissed.

O'Connor, Matter of Estate of. Adams County. Escheat. Property surrendered to state. (Issue in re inheritance tax appealed to district court).

State v. Anderson, Torbitt and Elwood. Antelope County. Liquor. Guilty.

State v. Cox. Polk County. Borrowing funds from bank while officer. Pending negotiations of settlement.

State v. Crandall. Cass County. Excessive speed in operation of motor bus. Dismissed.

State v. Diebler. Pierce County. Making false entries. Pending.

State v. Domnissee, Carrico and Nichols. Madison County. Liquor. Dismissed.

State v. Hastings, Miller and Campbell. Lincoln County. Unlawful assembly. Acquittal.

State v. Hayes. Burt County. Liquor. Acquittal.

State v. Hinds. Gage County. Violation of banking law. Conviction. Affirmed in district court. Pending in Nebraska Supreme Court.

State v. Johnson. Burt County. Liquor. Pending.

State v. Philben. Antelope County. Practicing medicine without license. Found not guilty.

State v. Pilger. Pierce County. Embezzlement. Conviction. Affirmed in district court. Pending in Nebraska Supreme Court.

State v. Estate of Rosenblatt. Douglas County. Claim for gasoline taxes. Judgment for defendant. Adverse ruling to state in district court.

State v. Stillman. Burt County. Liquor. Acquittal.

State v. Wildhaber. Jefferson County. Violation of banking law. Pending.

State v. Wright. Gage County. Indirect borrowing of funds. Settlement.

Znojemsky, Re Estate of. Fillmore County. Escheat. Settled.

CASES IN DISTRICT COURTS OF NEBRASKA FROM JANUARY 4, 1929, TO DECEMBER 15, 1930, DATE OF THIS REPORT, IN WHICH THE ATTORNEY GENERAL APPEARS AS COUNSEL

Abie State Bank v. McMullen, et al. Lancaster County, Injunction. Collection of assessment enjoined. Reversed by Nebraska Supreme Court. Pending in United State Supreme Court.

Ayres v. State. Gage County. Injunction. Working hours for women restraining order granted.

Bailey v. State. Colfax County. Condemnation. Settled.

Benner, et al v. Department of Agriculture, et al. Douglas County. Injunction, apartment house law. Pending.

Biesecker v. Weygint, et al. Lancaster County. Personal injuries. Pending.

Boeing Air Transport Inc. v. Stebbins, et al. Lancaster County. State Treasurer enjoined from collecting tax on gasoline used in interstate commerce.

Brott v. Fenton. Lancaster County. Habeas corpus. Denied. Pending in Nebraska Supreme Court.

Callahan-Walker Construction Co. v. State, et al. Lancaster County. Highway claim. Pending.

Clayton v. Board of Examiners. Gage County. Sterilization. Order of board affirmed. Pending in Nebraska Supreme Court.

Consumers Oil Company v. Stebbins, et al. Lancaster County. Injunction, gasoline tax. Pending.

Cozad Ditch Co., et al v. Dawson Co. Irrigation Co., et al. Dawson County. Injunction. Demurrer of defendant sustained. Dismissed. Affirmed by Nebraska Supreme Court.

Darling v. Fenton. Lancaster County. Habeas corpus. Writ granted. Pending in Nebraska Supreme Court.

Dellinger v. Fenton. Lancaster County. Coram nobis. Denied.

Dellinger v. Fenton. Lancaster County. Habeas corpus. Returned to reformatory.

Department of Public Works v. Cozad Ditch Co. Dawson County. Appeal from order of Highway Department. Pending.

Department of Public Works v. Stibal and Kodad. Colfax County. Condemnation. Settled.

Department of Trade and Commerce v. Christensen and Kiddle. Saunders County. Fire hazard. Order of Fire Marshal sustained.

Douglas County v. Shannon. Douglas County. Distribution of tax collections. Pending.

Duncan v. Griffiths. Lancaster County. Habeas corpus. Denied.

Eidenmiller v. Department of Public Works. Holt County. Workmen's compensation. Compensation allowed. Reversed by Nebraska Supreme Court.

Elmen v. State Board of Equalization and Assessment. Lancaster County. Taxation. Dismissed.

Failla v. Board of Examiners. Lancaster County. Sterilization. Order reversed.

Farmers' Irrigation Dist. v. Willis, et al. Scotts Bluff County. Injunction. Dismissed.

George v. Onken, et al. Clay County. Injunction, destruction of trees. Demurrer sustained.

Glover v. State. Lancaster County. Personal injuries. Judgment for plaintiff.

Goulding v. State. Douglas County. Taxes paid under protest. Judgment for plaintiff. On advice of Secretary of State case not appealed.

Harmer v. Miller. Lancaster County. Habeas corpus. Denied. Dismissed by Nebraska Supreme Court.

Haris v. Fenton. Lancaster County. Habeas corpus. Denied.

Harris v. Pollard. Lancaster County. Refusal to issue medical license to alien. Pending.

Harrop v. State. Douglas County. Recovery of rentals paid on land. Demurrer sustained.

Hickmen v. Fenton. Lancaster County. Habeas corpus. Writ granted. Affirmed by Nebraska Supreme Court.

King v. Fenton. Lancaster County. Habeas corpus. Prisoner discharged. Affirmed by Nebraska Supreme Court.

Knight v. State. Lancaster County. Claim for damages. Dismissed.

Kugler v. State. Lancaster County. Suit authorized by Legislature for injuries. Pending on demurrer.

Kurz v. State. Douglas County. Injuries. Dismissed.

Lincoln Safe Deposit Co. v. Marshall, et al. Lancaster County. Title to land quieted in State of Nebraska.

Lynn v. County of Kearney. Kearney County. Declaratory judgment, road case. Judgment for plaintiff. Pending in Nebraska Supreme Court.

McMullen v. Spradling. Lancaster County. Habeas corpus. Dismissed.

McNeel v. State. Lincoln County. Suit authorized by Legislature for breach of contract. Judgment for plaintiff. Pending in Nebraska Supreme Court.

Massman, et al v. Purdy, et al. Madison County. Bovine tuberculin test. Continuance—test made.

May v. Fenton. Lancaster County. Habeas corpus. Released.

Mehrens v. Greenleaf. Douglas County. Intangible tax. Judgment for plaintiff. Reversed by Nebraska Supreme Court.

Mercer v. Fenton. Lancaster County. Habeas corpus. Writ granted. Reversed by Nebraska Supreme Court.

Moore v. Chapman. York County. Habeas corpus. Pending.

Myers v. Fenton, Lancaster County. Habeas corpus. Denied. Pending in Nebraska Supreme Court.

Myers v. Fenton, Lancaster County. Habeas corpus. Pending in Nebraska Supreme Court.

Northern Nebraska Power Co. v. County of Boyd. Boyd County. Refund of franchise tax. Demurrer sustained in Holt County case and pending in Nebraska Supreme Court.

Northern Nebraska Power Co. v. County of Holt. Holt County. Refund of franchise tax. Demurrer of state sustained. Argued and submitted to Nebraska Supreme Court.

Northwestern Iron and Metal Co. v. White, et al. Lancaster County. Injunction. Trial on demurrer. Dismissed.

O'Connor, Matter of Estate of. Adams County. Inheritance tax. Pending.

Omaha Grain Exchange, et al v. Spillman. Lancaster County. Injunction. Demurrer sustained. Affirmed by Nebraska Supreme Court.

Petersen v. Beal, et al. Douglas County. Injunction. Sustained in part.

Petersen v. Condit, et al. Douglas County. Constitutionality of taxi-cab law (H. R. 306). Law upheld in some particulars. Pending in Nebraska Supreme court.

Peterson v. Department of Public Works. Lancaster County. Injunction, foreign truck license. State's demurrer granted. Pending in Nebraska Supreme Court.

Peterson, et al v. State. Lancaster County. Highway claim. Judgment for defendant. Affirmed by Nebraska Supreme Court.

Peterson, et al v. State, et al. Lancaster County. Highway claim. Settled and dismissed.

Peterson, et al v. State, et al. Lancaster County. Highway claim. Settled and dismissed.

Peterson, et al v. State, et al. Lancaster County. Highway claim. Settled and dismissed.

Peterson, et al v. State, et al. Lancaster County. Highway claim. Settled and dismissed.

Reed v. Fenton. Lancaster County. Habeas corpus. Denied.

Salistean v. Fenton. Lancaster County. Habeas corpus. Denied. Pending in Nebraska Supreme Court.

Samuelson v. County of Nance. Nance County. Injunction. Pending.

Seymour, et al v. State. Lancaster County. Claims of depositors. Pending.

Slattery v. Dout, et al. Sioux County. Quieting title. Judgment for defendants. Appeal being perfected to Nebraska Supreme Court.

State v. Aldrich. Nuckolls County. Receiving deposits in insolvent bank. Plea in abatement overruled.

State v. Anderson. Andelope County. Burglary. Acquittal.

State v. Appel. Howard County. Forgery. Preliminary hearing waived, bound over. Pending.

State v. Armstrong. Douglas County. Embezzlement. Pending.

State v. Asplund. Johnson County. Failure to pay state on tractor. Settled and dismissed.

State v. Barth. Saunders County. Second degree murder. Dismissed.

State v. Benson. Saunders County. Intent to defraud. Pleaded guilty.

State v. Bone Creek township. Butler County. Reimburse state for paving road. Reversed by Nebraska Supreme Court. Judgment for state. Objections filed to entering judgment upon mandate. Pending.

State v. Carek. Saunders County. Misapplication of bank funds. Pleaded guilty.

State v. Commercial Casualty Insurance Co. Lancaster County. Damages for breach and default of contractor. Pending.

State v. Coryell Marketing Co. Douglas County. Anti-discrimination. Pending.

State v. Cox. Polk County. Illegal loans. Pending settlement.

State for benefit of Douglas County v. General News Bureau. Douglas County. Failure to comply with statute regulating telegraph and news companies. Pending.

State v. Elmelund. Saunders County. False reports. Pending.

State v. Farmers Paint and Oil Co. Douglas County. Gasoline tax. Judgment for state.

State v. Farmers Paint and Oil Co. Douglas County. Ouster. Decree to oust and forfeit charter obtained.

State v. Foreman. Dawson County. False reports. Pending.

State v. Freeman. Antelope County. Liquor. Conviction.

State v. General News Bureau. Douglas County. Failure of corporation domesticate. Pending.

State v. Griess. Clay County. Embezzlement. Conviction.

State v. Gutru. Boone County. Making false entries. Pleaded guilty.

State v. Hancock. Thurston County. Making false reports. Pending.

State v. Hancock. Thurston County. Making false reports. Pending.

State v. Hinds. Gage County. Embezzlement, false entries and issuing excess bills payable. Conviction. Pending in Nebraska Supreme Court.

State v. Hogoboom. Frontier County. Aiding and abetting embezzlement. Acquittal.

State v. Hogoboom. Frontier County. Embezzlement. Conviction. Pending in Nebraska Supreme Court.

State v. House, et al. Douglas County. Gambling. Injunction obtained.

State v. Johnson. Nemaha County. Embezzlement. Conviction. Affirmed in part by Nebraska Supreme Court.

State v. Johnson. Scotts Bluff County. Embezzlement. Acquittal.

State v. Kastle. Dodge County. False entries and reports. Pending.

State v. Kastle. Dodge County. Issuing excess bills payable. Pending.

State v. Kastle. Dodge County. Receiving deposits in insolvent bank. Acquittal. Pending in Nebraska Supreme Court.

State v. Kirchman. Saunders County. Intent to defraud. Pleaded guilty.

State v. Kirchman. Saunders County. False entries and reports. Pending.

State v. Kirchman. Saunders County. Misapplication of bank funds. Pleads guilty.

State v. Kirchman. Seward County. Fraud. Acquittal.

State v. Kirchman and Kirchman. Saunders County. Fraud. Indictment returned by Grand Jury.

State v. Kirchman and Kirchman. Seward County. Fraud. Pending.

State v. Kirchman, Kirchman and Podhaisky. Saunders County. Embezzlement, abstraction and misapplication. Pending.

State v. Kirchman, Kirchman and Podhaisky. Saunders County. False entries. Pending.

State v. Lancaster County. Collection of expense for testing cattle for tuberculosis. Verdict for plaintiff. Settled.

State v. Lemisch. Douglas County. Recovery from estate for maintenance. Judgment for state.

State v. Lewis. Franklin County. Rape Found guilty and sentenced.

State v. County of Lincoln. Lincoln County. Payment of taxes. settled.

State v. Michel. Douglas County. Obtaining money under false pretences. Pending.

State v. Miller. Franklin County. Rape. Acquittal.

State v. Minarik. Thurston County. Making false reports. Pending.

State v. Morey. Lancaster County. Excessive claim. Dismissed.

State v. Morton. Scotts Bluff County. Embezzlement. Conviction. Pending in Nebraska Supreme Court.

State v. Murphy. Dawson County. Arson. Acquittal.

State v. Nelson. Boone County. Making false entry. Pending.

State v. Ohslund and Benson. Saunders County. False entries and reports. Pending.

State v. Peart. Franklin County. Embezzlement. Conviction.

State v. Peoples Gasoline Co. Douglas County. Gasoline inspection fees. Pending.

State v. Phalin. Holt County. Barbering without license. Settled and dismissed.

State v. Pilger. Pierce County. Embezzlement. Conviction. Pending in Nebraska Supreme Court.

State v. Rice. Lancaster County. Abortion. Conviction. Pending in Nebraska Supreme Court.

State v. Estate of Rosenblatt. Douglas County. Claim for gasoline tax. Judgment for defendant.

State v. Ruben, et al. Douglas County. Gambling. Injunction obtained.

State v. Smith. Douglas County. Embezzlement. Pending.

State v. Spearman. Morrill County. Making false reports. Conviction. Pending in Nebraska Supreme Court.

State v. Studley. Boyd County. Embezzlement. Pending.

State v. Studley. Boyd County. False entries. Pending.

State v. Studley. Boyd County. Forgery. Pending.

State v. Tomes. Saunders County. False reports. Pending.

State v. Van Kirk. Antelope County. Assault. Conviction.

State v. Weir. Nuckolls County. Receiving deposits in insolvent bank and false entries. Colorado Governor denied application for requisition.

State v. Westbrook. Otoe County. Embezzlement. Conviction. Pending in Nebraska Supreme Court.

State v. Wilson. Morrill County. False reports. Dismissed.

State v. Wright. Gage County. False reports, illegal loans. Pending.

State v. Wupper. Cuming County. Embezzlement. Defendant a fugitive from justice.

State v. Young. Nemaha County. Receiving deposits in bank while insolvent. Acquittal.

State v. Ziegman, et al. Douglas County. Contempt of court for violating injunction. Guilty and fined.

State v. Ziegman, et al. Douglas County. Gambling. Injunction obtained.

State, ex rel Beatrice Creamery Co. v. Marsh. Lancaster County. Mandamus, occupation tax. Statute held confiscatory. Reversed by Nebraska Supreme Court. Dismissed for want of a substantial Federal question by United States Supreme Court.

State, ex rel Busche & Gavenman Construction Co, v. Department of Public Works, et al. Lancaster County. Mandamus. Pending.

State, ex rel Central Realty & Investment Co. v. Weaver, et al. Lancaster County. Mandamus. Judgment for respondents Reversed with directions by Nebraska Supreme Court.

State, ex rel Church v. McLaughlin. Lancaster County. Mandamus. Dismissed.

State, ex rel Johnson v. Robinson, et al. Lancaster County. Turning over state money to successor. Judgment for plaintiff.

State, ex rel Leininger v. Griggs, et al. Lancaster County. Mandamus. Dismissed.

State, ex rel Massie v. Public Ownership League, et al. Clay County. Escheat. Pending.

State, ex rel Oleson v. Graunke, et al. Cuming County. Driver's license. Judgment for defendant. Affirmed by Nebraska Supreme Court.

State, ex rel School Dist. of Cedar County v. Taylor. Lancaster County. Mandamus. Pending.

State, ex rel Sorensen v. Clark, et al. Richardson County. Liquor. Dismissed.

State, ex rel Sorensen v. Conover, et al. Richardson County. Liquor. Case tried and taken under advisement. Pending.

State, ex rel Sorensen v. Fassler, et al. Richardson County. Liquor. Dismissed.

State, ex rel Sorensen v. Goldenrod Creamery Co., et al. Pierce County. Anti-discrimination. Pending.

State, ex rel Sorensen v. Gunn, et al. Richardson County. Liquor. Judgment for defendant, plaintiff not entitled to injunction.

State, ex rel Sorensen v. Jones, et al. Richardson County. Liquor. Judgment for injunction (not padlocking).

State, ex rel Sorensen v. Knudtsen. Cedar County. Bovine tuberculin test. Judgment for defendant. Pending in Nebraska Supreme Court.

State, ex rel Sorensen v. Lake. Douglas County. Revocation of medical license. Order of department affirmed. Pending in Nebraska Supreme Court.

State, ex rel Sorensen v. Miller. Richardson County. Liquor. Judgment for defendant.

State, ex rel Sorensen v. Omaha Grain Exchange. Douglas County. Injunction. Pending on motion.

State, ex rel Sorensen v. Smith. Furnas County. Revocation of license. Order of Welfare Department reversed.

State, ex rel Spillman v. First State Bank, Bethany. Lancaster County. Banking. Capital increased.

State, ex rel Spillman v. Hansen. Douglas County. Bovine tuberculin test. Dismissed.

State, ex rel Spillman v. Kistler. Adams County. Bovine tuberculin test. Judgment for defendant. Reversed with directions by Nebraska Supreme Court.

State, ex rel Spillman v. Peetz. Douglas County. Bovine tuberculin test. Dismissed.

State, ex rel Spillman v. Peetz. Douglas County. Bovine tuberculin test. Dismissed.

State, ex rel Spillman v. Schluter. Douglas County. Bovine tuberculin test. Dismissed.

State, ex rel Spillman v. Splittgerber, et al. Wayne County. Bovine tuberculin test. Injunction granted. Affirmed by Nebraska Supreme Court.

State, ex rel Spillman v. Thaden. Douglas County. Bovine tuberculin test. Dismissed.

State, ex rel Spillman v. Veskerna. Douglas County. Bovine tuberculin test. Dismissed.

Stilson v. Pollard. Hall County. Injunction, working hours for women. Pending.

Texas Company v. Marsh. Lancaster County. Corporation tax. Dismissed.

Weaver v. Koehn, et al. Lancaster County. Declaratory judgment. Dismissed and appropriation held void. Affirmed by Nebraska Supreme Court.

Welter v. Fenton. Lancaster County. Habeas corpus. Released.

Wenzel v. Griffiths. Gage County. Habeas corpus. Dismissed. Affirmed by Nebraska Supreme Court.

Wiles v. Department of Public Works. Cass County. Condemnation. Verdict for plaintiff. Pending in Nebraska Supreme Court.

CASES IN SUPREME COURT OF UNITED STATES FROM JANUARY 4, 1929 TO DECEMBER 15, 1930, DATE OF THIS REPORT, IN WHICH THE ATTORNEY GENERAL APPEARS AS COUNSEL

Abie State Bank v. Weaver, et al. Bank Guaranty Fund law. Pending.

Holmberg v. C. St. P. M. & O. Ry. Co. Underground cattle pass. Reversed.

Miller v. McLaughlin, et al. Injunction. Affirmed.

State, ex rel Beatrice Creamery Co. v. Marsh. Occupation tax. Dismissed for want of substantial Federal question.

CASES IN UNITED STATE DISTRICT COURT FROM JANUARY 4, 1929 TO DECEMBER 15, 1930, DATE OF THIS REPORT IN WHICH THE ATTORNEY ATTORNEY GENERAL APPEARS AS COUNSEL

General News Bureau v. Sorensen, et al. Injunction. Pending.

Goldwyn Distributing Corp. v. Sorensen, et al. Motion picture advance deposit law. Statute held unconstitutional.

Lower v. State. Habeas corpus. Denied.

Missouri Pacific Railroad Corp. in Nebr. v. Nebraska State Railway Commission. Injunction to prevent use of complainant's team track at Omaha. Argued and submitted.

O'Connor, et al v. Stanley, et al. Quieting title, accounting and distribution among heirs. Dismissed. Pending in Circuit Court of Appeals.

Peet Stock Remedy Co., et al v. McMullen. Constitutionality of Statutes governing practice of veterinary medicine. Dismissed. Order dismissing bill and dissolving restraining order affirmed by United States Circuit Court of Appeals.

Petersen Baking Co., et al v. McMullen. Injunction. Nebraska bread law held unconstitutional.

Peters Trust Co., Bankrupt, in Matter of. Liquidating agent ordered to turn over all property to receiver. Affirmed by Circuit Court of Appeals.

Slattery v. Dout, et al. Quieting title. Dismissed for lack of Federal question.

United States of America v. Scott. Taxation of military officers. Pending.

Western Union Telegraph Co. v. Weaver, et al. Franchise assessment. Pending.

CASES IN UNITED STATES CIRCUIT COURT OF APPEALS FROM JANUARY 4, 1929 TO DECEMBER 15, 1930, DATE OF THIS REPORT, IN WHICH THE ATTORNEY GENERAL APPEARS AS COUNSEL

Gamble v. Daniel. Bankruptcy. Order entered by United States District Court ordering liquidating agent to turn over all property to receiver affirmed.

O'Cannor, et al v. Stanley, et al. Quieting title, accounting and distribution among heirs. Pending.

Peet Stock Remedy Company, et al v. McMullen. Constitionality of new statutes governing the practice of veterinary medicine. Order of United States District Court dismissing bill and dissolving restraining order affirmed.

MATTERS BEFORE THE INTERSTATE COMMERCE COMMISSION FROM JANUARY 4, 1929 TO DECEMBER 15, 1930, DATE OF THIS REPORT, IN WHICH THE ATTORNEY GENERAL APPEARS AS COUNSEL

No. 23205, Nebraska State Railway Commission v. Atchison, Topeka & Santa Fe Railway Co., et al. Investigation in connection with potato rates.

Sioux City Bridge Co. Valuation. Pending.

Union Pacific Railroad Co. Valuation completed.

Western Union Telegraph Co. Valuation completed.

No. 17,000, Part 2, Class Rate Investigation. Pending.

No. 17,000, Part 7, Grain Rate Investigation. Pending.

No. 17,000, Part 9, Live Stock Investigation. Pending.

No. 17,000, Part 10, Hay Rate Investigation. Pending.

No. 17,000, Part 13, Salt Investigation. Pending.

PETITIONS FILED FOR APPOINTMENT OF RECEIVERS OF FAILED STATE BANKS

State ex rel Sorensen v. Allen State Bank, Allen, Nebraska.

State ex rel Sorensen v. First State Bank, Alliance, Nebraska

State ex rel Sorensen v. Farmers State Bank, Altona, Nebraska.

State ex rel Sorensen v. Ashland State Bank, Ashland, Nebraska.

State ex rel Sorensen v. Bank of Ashton, Ashton, Nebraska.

State ex rel Sorensen v. Nemaha County Bank, Auburn, Nebraska.

State ex rel Sorensen v. Bank of Bayard, Bayard, Nebraska.

State ex rel Sorensen v. Security Savings Bank, Beatrice, Nebraska.

State ex rel Sorensen v. Beemer State Bank, Beemer, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Belgrade, Nebraska.

State ex rel Sorensen v. State Bank of Belvidere, Belvidere, Nebraska.

State ex rel Sorensen v. Citizens State Bank, Benkelman, Nebraska.

State ex rel Sorensen v. First State Bank, Bethany, Nebraska.

State ex rel Sorensen v. American State Bank, Big Springs, Nebraska.

State ex rel Sorensen v. Farmers & Merchants State Bank, Bloomfield, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Bloomington, Nebraska.

State ex rel Sorensen v. Boone State Bank, Boone, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Bradish, Nebraska.

State ex rel Sorensen v. Brady State Bank, Brady, Nebraska.

State ex rel Sorensen v. Breslau State Bank, Breslau, Nebraska.

State ex rel Sorensen v. Nebraska State Bank, Bridgeport, Nebraska.

State ex rel Sorensen v. Custer State Bank, Broken Bow, Nebraska.

State ex rel Sorensen v. Brownlee State Bank, Brownlee, Nebraska.

State ex rel Sorensen v. Brunswick State Bank, Brunswick, Nebraska.

State ex rel Sorensen v. Bank of Burchard, Burchard, Nebraska.

State ex rel Sorensen v. Burton State Bank, Burton, Nebraska.

State ex rel Sorensen v. Citizens State Bank, Butte, Nebraska.

State ex rel Sorensen v. Cadams State Bank, Cadams, Nebraska.

State ex rel Sorensen v. Chadron State Bank, Chadron, Nebraska.

State ex rel Sorensen v. The State Bank of Champion, Champion, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Chapman, Nebraska.

State ex rel Sorensen v. State Bank of Clarks, Clarks, Nebraska.

State ex rel Sorensen v. Ranchers State Bank, Cody, Nebraska.

State ex rel Sorensen v. Bank of Crab Orchard, Crab Orchard, Nebraska.

State ex rel Sorensen v. The Security Bank, Creighton, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Dalton, Nebraska.

State ex rel Sorensen v. Denton State Bank, Denton, Nebraska.

State ex rel Sorensen v. The State Bank of Deweese, Deweese, Nebraska.

State ex rel Sorensen v. Dixon State Bank, Dixon, Nebraska.

State ex rel Sorensen v. Dodge State Bank, Dodge, Nebraska.

State ex rel Sorensen v. Bank of Douglas, Douglas, Nebraska.

State ex rel Sorensen v. Farmers & Merchants Bank, Elm Creek, Nberaska.

State ex rel Sorensen v. The Citizens Bank, Fairfield, Nebraska.

State ex rel Sorensen v. Washington County Bank, Fort Calhoun, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Fullerton, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Genoa, Nebraska.

State ex rel Sorensen v. Commercial Bank, Gibbon, Nebraska.

State ex rel Sorensen v. State Bank of Gilead, Gilead, Nebraska.

State ex rel Sorensen v. Community State Bank, Glenrock, Nebraska.

State ex rel Sorensen v. Perkins County State Bank, Grainton, Nebraska.

State ex rel Sorensen v. Commercial Bank of Grant, Grant, Nebraska.

State ex rel Sorensen v. Greeley State Bank, Greeley, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Greenwood, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Gurley, Nebraska.

State ex rel Sorensen v. State Bank of Haigler, Haigler, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Hallam, Nebraska.

State ex rel Sorensen v. Farmers and Mechanics Bank, Havelock, Nebraska.

State ex rel Sorensen v. State Bank of Havens, Havens, Nebraska.

State ex rel Sorensen v. State Bank of Humboldt, Humboldt, Nebraska.

State ex rel Sorensen v. Nebraska State Bank, Humboldt, Nebraska.

State ex rel Sorensen v. Bank of Otis and Murphy, Humphrey, Nebraska.

State ex rel Sorensen v. Inman State Bank, Inman, Nebraska.

State ex rel Sorensen v. Bank of Dakota County, Jackson, Nebraska.

State ex rel Sorensen v. Citizens Bank, Johnstown, Nebraska.

State ex rel Sorensen v. Bank of Julian, Julian, Nebraska.

State ex rel Sorensen v. Lamar State Bank, Lamar, Nebraska.

State ex rel Sorensen v. State Bank of Laurel, Laurel, Nebraska.

State ex rel Sorensen v. Lindsay State Bank, Lindsay, Nebraska.

State ex rel Sorensen v. State Bank of Litchfield, Litchfield, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Loomis, Nebraska.

State ex rel Sorensen v. Loretto State Bank, Loretto, Nebraska.

State ex rel Sorensen v. Loup City State Bank, Loup City, Nebraska.

State ex rel Sorensen v. Lyman State Bank, Lyman, Nebraska.

State ex rel Sorensen v. Madrid Exchange Bank, Madrid, Nebraska.

State ex rel Sorensen v. Malmo State Bank, Malmo, Nebraska.

State ex rel Sorensen v. Marion State Bank, Marion, Nebraska.

State ex rel Sorensen v. Citizens State Bank, Martinsburg, Nebraska.

State ex rel Sorensen v. Martinsburg State Bank, Martinsburg, Nebraska.

State ex rel Sorensen v. Maxwell State Bank, Maxwell, Nebraska.

State ex rel Sorensen v. Security Bank, Meadow Grove, Nebraska.

State ex rel Sorensen v. Nebraska State Bank, Milford, Nebraska.

State ex rel Sorensen v. First Bank of Miller, Miller, Nebraska.

State ex rel Sorensen v. State Bank of Minatare, Minatare, Nebraska.

State ex rel Sorensen v. American Bank, Mitchell, Nebraska.

State ex rel Sorensen v. Mitchell State Bank, Mitchell, Nebraska.

State ex rel Sorensen v. The Ponca Valley State Bank, Monowi, Nebraska.

State ex rel Sorensen v. First State Bank, Murphy, Nebraska.

State ex rel Sorensen v. First State Mank, Nacora, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Newman Grove, Nebraska.

State ex rel Sorensen v. Newman Grove State Bank, Newman Grove, Nebraska.

State ex rel Sorensen v. Security Savings and Loan Ass'n, Newman Grove, Nebraska.

State ex rel Sorensen v. The Farmers State Bank, Newport, Ne-

State ex rel Sorensen v. First State Bank, North Bend, Nebraska.

State ex rel Sorensen v. Hinds State Bank, Odell, Nebraska.

State ex rel Sorensen v. Peters Trust Company, Omaha, Nebraska.

State ex rel Sorensen v. Nebraska State Bank, O'Neill, Nebraska.

State ex rel Sorensen v. Exchange Bank, Ong, Nebraska.

State ex rel Sorensen v. Bank of Commerce, Ong, Nebraska.

State ex rel Sorensen v. The Bank of Orleans, Orleans, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Overton, Nebraska.

State ex rel Sorensen v. Overton State Bank, Overton, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Panama, Nebraska.

State ex rel Sorensen v. Commercial State Bank, Paxton, Nebraska.

State ex rel Sorensen v. Citizens State Bank, Pierce, Nebraska.

State ex rel Sorensen v. Pierce State Bank, Pierce, Nebraska.

State ex rel Sorensen v. Citizens State Bank, Plainview, Nebraska.

State ex rel Sorensen v. Security State Bank, Plainview, Nebraska.

State ex rel Sorensen v. Bank of Polk, Polk, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Polk, Nebraska.

State ex rel Sorensen v. Security Bank of Ponca, Ponca, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Raeville, Nebraska.

State ex rel Sorensen v. Ralston State Bank, Ralston, Nebraska.

State ex rel Sorensen v. Citizens State Bank, Ravenna, Nebraska.

State ex rel Sorensen v. Nebraska State Bank, Republican City, Nebraska.

State ex rel Sorensen v. Richfield State Bank, Richfield, Nebraska.

State ex rel Sorensen v. Farmers Security State Bank, Rohrs, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Scotia, Nebraska.

State ex rle Sorensen v. The Irrigators Bank, Scottsbluff, Nebraska.

State ex rel Sorensen v. Scribner State Bank, Scribner, Nebraska.

State ex rel Sorensen v. Meisner State Bank, Shelton, Nebraska.

State ex rel Sorensen v. Bank of Sprague, Sprague, Nebraska.

State ex rel Sorensen v. Elkhorn Valley State Bank, Stanton, Nebraska.

State ex rel Sorensen v. Farmers State Bank, St. Edward, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Stella, Nebraska.

State ex rel Sorensen v. Frontier County Bank, Stockville, Nebr.

State ex rel Sorensen v. Strang State Bank, Strang, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Stromsburg, Nebraska.

State ex rel Sorensen v. The Citizens State Bank, Superior, Nebraska.

State ex rel Sorensen v. Farmers Exchange Bank, Tamora, Nebraska.

State ex rel Sorensen v. Thurston State Bank, Thurston, Nebraska.

State ex rel Sorensen v. State Bank of Touhy, Touhy, Nebraska.

State ex rel Sorensen v. Merchants Bank, Utica, Nebraska.

State ex rel Sorensen v. Nebraska State Bank, Valparaiso, Nebraska.

State ex rel Sorensen v. Knox County Bank, Verdigre, Nebraska.

State ex rel Sorensen v. Vesta State Bank, Vesta, Nebraska.

State ex rel Sorensen v. Farmers State Bank, Wabash, Nebraska.

State ex rel Sorensen v. Nebraska State Savings Bank, Wahoo, Nebraska.

State ex rel Sorensen v. The Citizens State Bank, Wahoo, Nebraska.

State ex rel Sorensen v. Security State Bank, Wakefield, Nebraska.

State ex rel Sorensen v. Farmers & Merchants Bank, Weston, Nebraska.

State ex rel Sorensen v. First State Bank, Winnetoon, Nebraska.

State ex rel Sorensen v. State Bank of Wolbach, Wolbach, Nebraska.

State ex rel Sorensen v. Farmers & Merchants Bank, Wymore, Nebraska.

OPINIONS
of
ATTORNEY GENERAL

GASOLINE TAX—DISTRIBUTION WITHIN COUNTY

February 6, 1930

Mr. W. E. Mumby,
Attorney-at-Law,
Harrison, Nebraska.
Dear Sir:

This is in answer to your letter of February 1, 1930, requesting information as to how the county's share of the gasoline tax proceeds should be distributed within the county.

Laws, 1929, Ch. 166, puts the county's share of the gasoline tax proceeds in the county road fund. The first part of Laws 1929, Ch. 180, divides the county road fund into equal parts: one part for equal division among and expenditure in the three commissioner districts; the other part for distribution to and expenditure in the road districts from which it was collected. Since the county share of the gasoline tax proceeds cannot be identified as collected from any particular road districts, we have repeatedly advised that it goes in that part of the county road fund which is for equal division among the commissioner districts.

By a later sentence in Laws, 1929, Ch. 180, it is provided:

> "There shall be expended on each road district of the county such per cent of the total county road fund as the per cent which the county road mileage of each district bears to the total county road mileage of the county."

Comformably to the rule that all provisions of a statute should be given force and effect as far as possible, the gasoline tax proceeds should, in our opinion, be first equally divided between the three commissioner districts, and then pro rated among the road districts thereof in proportion to the ratio of county road mileage in the road districts to the total county road mileage.

Sincerely yours,
C. A. SORENSEN, Attorney General
By CLIFFORD L. REIN, Assistant Attorney General

ORDINANCES—CLASSIFICATION—THOSE PROHIBITING OFFENSES UNDER STATE LAW DISTINGUISHED FROM THOSE CREATING OFFENSES

September 27, 1930

Mr. Wm. Loder, Chairman,
Board of Trustes,
Waverly, Nebraska.
Dear Sir:

You submit to us for opinion the letter under date of September 24, 1930, to Dr. A. L. Emery of Waverly from attorney W. of Lincoln who advises that the judgments for fines for violations of the Waverly school-stop ordinance are void or voidable because rendered by a police judge dependent for his compensation upon the conviction of the accused persons.

In this position, Mr. W. may be correct. But it is not clear to us that he is so. With Tumey v. Ohio, U. S. S. C., 71 L. Ed. 749, cited by Mr. W., we are in full accord. We know and understand that judges dependent for fees in any substantial amount upon convictions of or judgments against defendants, are disqualified by interest and partiality to try cases. But we are unable to agree that the police judge of Waverly, trying cases for the violation of the school-stop ordinance, is dependent upon a judgment against the defendants for his fees.

The school-stop ordinance is a general and permanent ordinance adopted pursuant to the village's police power to regulate traffic upon its street and highways (Sections 4229, 4279, 4206, Compiled Statutes, 1922). Such police power ordinances are of two classes. The first class consists of ordinances punishing acts which are also offenses against the criminal laws of the state. Of this class a good illustration is an ordinance duplicating the law against the possession, sale and manufacture of intoxicating liquor (See Tumey v. Ohio, supra). The second class comprises ordinances regulating or prohibiting and punishing acts which are not also offenses against the criminal laws of the state. Of this class a good illustration is the Waverly ordinance placing, commanding the observance and penalizing the non-observance of school stop signs at certain street and highway crossings in Waverly; a subject which is neither duplicated nor otherwise covered in whole or in part by any criminal statute of the state of Nebraska. For violation of the first class of police power ordinances the remedial procedure is both in form and substance a criminal prosecution. But for the violation of the second class of police power ordinances, including the school-stop ordinance in question, the remedial procedure, though criminal in form and incidentals such as process and ancillary imprisonment for non-payment of fines, is a civil action for the recovery of a debt which is the penalty or money only. (See Sections 4279 and 4313, Compiled Statutes of Nebraska, 1922; Bailey v. State, 30 Neb. 855, 47 N. W. 208; Peterson v. State, 79 Neb. 132, 112 N. W. 306; Pulver v. State, 83 Neb. 446, 119 N. W. 780; Cleaver v. Jenkins, 84 Neb. 565, 121 N. W. 984; Western Union Telegraph Company v. City of Franklin, 93 Neb. 704, 706, 141 N. W. 819).

The important distinctions just observed are clearly set forth by

the Nebraska Supreme Court in Peterson v. State, 79 Neb. 132, 112 N. W. 306, as follows:

> "At common law, and independent of statutory enactments, punishments for violation of municipal ordinances were treated in the light of civil actions; imprisonment for non-compliance with the order of the court being looked upon, not in the light of punishment, but as a means of compelling a compliance with the orders of the court and enforcing payment. The general doctrine appears to be that, where an act is not criminal under the laws of the state, a municipal ordinance will not make it so, and that an action to recover a penalty prescribed by a municipal ordinance on account of an act not criminal by the general law of the state, but forbidden by such ordinance, is a civil action. City of Huron v. Carter, 57 N. W. 947, 5 S. D. 4.
>
> "McQuillan's Municipal Ordinances, Section 304, asserts that the weight of judicial authority holds that the prosecution for the violation of a municipal ordinance is in the nature of a civil action for the recovery of a debt. Sometimes the action is regarded as criminal where the offense constitutes a misdemeanor under the laws of the state; but ordinances of the character of the one in question, forbidding the doing of an act that is not per se criminal or immoral, that is not made a crime or misdemeanor by any law of the state, is a mere rule or regulation for the government of the community within the municipal limits, and does not come within the category of acts considered criminal under our constitution or statutes.
>
> "In Sutton v. McConnell, 50 N. W. 414, 46 Wis. 269, the Supreme Court of Wisconsin, in answer to the argument that a prosecution for the violation of a city ordinance was a criminal prosecution, said: 'We think it is not. No law in force when that prosecution was instituted made it a criminal offense to use wanton or obscene language within the corporate limits of the city of Columbus. The use of such language there gave the city a right of action against the offender to recover a prescribed penalty therefor. Under the charter of the city an action to recover such penalty may be commenced either by summons or warrant. But, whether commenced by the one process or the other, the pleadings and judgment are the same. In either case it is nothing more than a civil action to recover a penalty. Hence it was competent for the magistrate, as in other civil actions, to act upon the stipulation of the parties and to determine the action, and render judgment therein.'

> "Section 8751, Cobbey's Ann. St. 1903 (Sec. 4313, Comp. St. 1922), found in the chapter relating to cities and villages is in the following language: 'Fines may, in all cases, and in addition to any other mode provided, be recovered by suit or action before a justice of the peace, or other court of competent jurisdiction, in the name of the state. And in any such suit, or action, where pleading is necessary, it shall be sufficient to declare generally for the amount claimed to be due in respect to the violation of the ordinance, referring to its title and the date of its adoption or passage, and showing as near as may be the facts of the alleged violation.' From this it will be seen that the Legislature contemplated a civil action for the recovery of a fine imposed for the violation of an ordinance, and in such case clear and satisfactory proof of the violation would certainly be sufficient to warrant a recovery."

It is thus established beyond all peradventure of a doubt that in Nebraska the remedial procedure for the violation of the non-criminal school-stop ordinance is a civil action for the recovery of money, the fine, the penalty only. Hence, in school-stop prosecutions the rule for the taxation and recovery of costs including the fees of the justice of the peace, police judge or other magistrate trying the case, must be the statutory rule for the taxation and recovery of such costs in civil actions for the recovery of money only.

By Section 4408, Comp. St. 1922, the police magistrate receives for his services the same fees and costs as are allowed justices of the peace for similar services. These fees are scheduled in Section 2400, Comp. St. 1922. In the provisions of the Code of Civil Procedure relating exclusively to justices of the peace (Secs. 9308-9499, Comp. St. 1922), we fail to find any directions for the taxation and recovery of costs in civil actions before the justice for the recovery of money. In Section 9482, Comp. St. 1922, we do find it enacted that "The provisions of this code (Civil Procedure), which are in their nature applicable and in respect to which no special provision is made by statute, shall apply to proceedings before justices of the peace." And, by the Code of Civil Procedure (Sections 9118 and 9120, Comp. St. 1922), in civil actions for the recovery of money only, costs are taxed to and recovered from the defendant when plaintiff obtains judgment and from the plaintiff when the defendant obtains judgment.

By Section 4313, Comp. St. 1922, which we have already observed, the action for the fine for the violation of the school-stop ordinance is in the name of the state of Nebraska. But the state of Nebraska has not by statute assumed liability for costs in such actions (Kent v. State, 225 N. W. 672). Hence, on judgment for defendant in such actions, there

is no authority in the police magistrate under Section 9120, supra, to tax the costs to the state. Neither is there authority in the police judge under Section 9120 to tax the costs, including his fees, upon a judgment for the defendant, to the village of Waverly; for Section 4408 Comp. St. 1922, provides: "In no case shall the city or village be liable to pay any costs or fees before any police magistrate."

With the state and the village thus excluded from liability for costs in school-stop ordinance prosecutions, there is left to incur this liability, when the defendant prevails, the moving, responsible, actual plaintiff, namely, the person who signed the complaint, declaration, petition, bill of particulars or whatever name the initial pleading chances to be called by. The statute does not expressly mention him but the common law (See Section 3085, Comp. St. 1922) strongly points to him as the party primarily liable for the costs when the defendant is successful. As stated by Taft, C. J., in Tumey v. Ohio, 71 L. Ed., 749, 755: "There was always a plaintiff, whether in the action for a tort or the prosecution for an offense. If he failed to prove his case, whether civil or criminal, he was subject to amercement **pro falso clamore,** while if he succeeded the defendant was in **misericordia."**

We are, therefore, of the opinion that in prosecutions, or, more properly speaking, actions for fines for violation of the Waverly school-stop ordinance, the costs, including the fees for the services of the police judge, should be, and in contemplation of law, are taxed to the party signing the complaint when the defendant prevails and to the defendant when the complainant prevails. Under these circumstances the fees of the judge are in no sense dependent upon conviction. The judge gets his fees — questions of financial responsibility waived — whether his judgment is for the complainant or for the defendant.

It follows that the United States Supreme Court's decision in Tumey v. Ohio, supra, does not rule judgments for fines under the school-stop ordinance or any other regulatory ordinance punishing acts not made criminal by the laws of this state. In the Tumey case, the prosecution was for violation of a liquor ordinance parallelling a liquor statute denouncing as crimes the acts forbidden by the ordinance. In the Tumey case, wherein the judge was held disqualified by interest, the prosecution was, therefore, an actual criminal prosecution with no remedy to the judge for fees or costs except upon conviction of the defendant; while, under the Waverly school-stop ordinance, the so-called "prosecution" is merely a civil action for the recovery of money wherein the judge is legally sure to get his costs whether from defendant if convicted or from complainant if defendant is acquitted. In Mr. W.'s opinion the defect flows from the failure to distinguish between prosecutions for the two classes of ordinances; one denouncing acts made criminal by

state laws; the other providing penalties for breach of mere non-criminal, regulatory measures.

There is also, in our opinion, a serious legal defect in Mr. W.'s proposed itinerary around the question he raises as to the power of the police judge when paid by fees, to act in school-stop cases. Mr. W. suggests that the village pay a salary to the police judge who will turn the fees for his services, taxed and collected as costs, to the village. The trouble with this suggestion is that "a municipal corporation possesses only such powers as are expressly conferred upon it by statute, or are necessary to carry into effect some enumerated power" (State v. Temple, 99 Neb. 505, 156 N. W. 1063). Section 4231 Comp. St. 1922, provides the officers to whom the village may pay a salary and the limits of the salary. The police judge is not one of these officers. Instead, Section 4408 provides that the police magistrate shall be paid by fees, thereby excluding the thought of his being paid by a salary or in some other manner. The pursuit of Mr. W.'s suggestion would, therefore, invite justifiable and simultaneous attack from innumerable tax payers without adding anything essential to the validity of the police court's judgments in school-stop cases.

In conclusion permit us to say that throughout its statehood Nebraska has had, and still has, hundreds of municipalities making and enforcing regulatory ordinances. So far as we are aware the ordinance-enforcing tribunals are paid salaries in Omaha and Lincoln only; just two of these innumerable municipalities. In all the rest of them the ordinances are enforced by fee-paid police judges and justices of the peace. Against the judgments of so many vital and necessary courts, it is a serious step not only to pronounce a verdict of invalidity or voidability but to leave in the slightest question the integrity of their otherwise legal judgments in ordinance cases. For this reason we have set forth fully, and in a manner impossible to be misunderstood, the reasons for our conviction that the police judge in trying non-criminal ordinances cases is in no sense dependent for his fees upon the outcome of the case and is not disqualified by interest from trying such cases.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General
By CLIFFORD L. REIN, Assistant Attorney General

AGRICULTURAL SOCIETY—APPROPRIATION FOR FROM COUNTY GENERAL FUND

January 14, 1930.

Mr. Lloyd H. Jordan,
County Attorney,
Gordon, Nebraska.
Dear Sir:

The question, as I understand it, is whether the county board had authority to appropriate money from the general fund for the benefit of the agricultural society, and if, after having done so, it had authority to return such money to the general fund.

It is our opinion that the legislature intended that only money raised by the special levy provided in Section 6, Compiled Statutes for 1922, as amended by Chapter 13, Session Laws of 1927, should be used for the benefit, of agricultural societies, and that they should receive no support out of the general fund. At least we can find no statutory authority for expending any part of the general fund for such purpose.

In 15 C. J., 583, Sec. 284, it says:

> "With regard to the purpose of creating a general county fund, it may be stated generally that it is created for the purpose of meeting such expenses as the maintenance and conduct of the necessary business of the county require. * * * County commissioners have no authority to depart from statutory directions and limitations in regard to the general fund."

We think it was the clear intention of the legislature to provide for the support and maintenance of agricultural societies solely from the fund created by the special levy provided for in Section 6, and that any appropriation from the general fund for such purpose was without statutory authority and illegal. Section 869, Compiled Statutes for 1922, provides for the payment into the general fund of surplus moneys from special funds, but we find no provision for payment from the general fund into the special fund created for the benefit of agricultural societies.

It follows that the original appropriation from the general fund to the fund of the agricultural society having been unauthorized and illegal, its return to the general fund from the fund of the agricultural society by the county board was both lawful and proper.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

PUBLIC UTILITIES—"SACREDNESS" OF FRANCHISE CONTRACTS

January 22, 1930.

Mr. J. F. Moredick,
3330 Fowler Avenue,
Omaha, Nebraska.
Dear Sir:

In your letter of January 16th you inquire as to the "sacredness" of

written contracts with public utilities and especially as regards provisions in franchise contracts between cities and public utility companies fixing definite rates, fares or other charges for service to be furnished by the grantee of the franchise.

You make reference to the five cent fare contract involved in recent litigation in New York City. We take it that you refer to the case of Interborough Rapid Transit Company v. Gilchrist, 26 Fed. (2d) 912, reversed and remanded by the Supreme Court of the United States in 279 U. S. 159, 49 Sup. Ct. 282. Apr. 8, 1929.

The opinion of the lower court, while discredited to some extent by the reversal of the United State Supreme Court on other grounds, contains an excellent review of some of the leading cases in this country on this subject. The rules announced in this case are not novel and correspond, in the main, to the general trend of authority referred to below.

We believe the majority view of the courts in this country on the question you ask is:

First: That if the municipality has been granted by the legislature the power to enter into contracts with public utility companies wherein rates may be fixed or provided for, such a contract is binding upon both parties thereto, notwithstanding that the rates thus fixed may result in loss to the utility or, on the other hand, may prove excessive.

Second: Such contracts are subject to the power retained by the state,—either expressly through constitutional or statutory reservations, or impliedly as an attribute of its sovereignty,—to alter, amend or abrogate the rate fixing provisions of such franchise contracts, either by direct statute fixing reasonable rates, or by delegating to some public service commission the power to make such rate adjustments as will be deemed reasonable under recognized constitutional standards.

The courts have repeatedly held that, as between the parties themselves, and in the absence of the exercise by the state of its reserved or inherently retained power, courts of equity will not interfere with the contract at the behest of either party seeking relief from a bad bargain.

The question of whether the municipality has actually been granted the power to enter into such a rate-fixing contract is a matter of construction of state constitutional and statutory law. If the state courts have passed on the question, the federal courts will accept such construction as binding in controversies involving the "due process" and "impairment" clauses of the federal constitution. Ordinarily, but not always, the federal courts have also accepted the state court's construction of the power of rate-fixing reserved in the state and the effect

of the later exercise of that power upon existing franchise contracts.

Perhaps the last expression of the Supreme Court of the United States on this subject is found in the case of Railroad Commission of California v. Los Angeles Railway Corporation, 50 Sup. Ct. 71, decided on December 2, 1929. The following excerpts from the opinion in that case clearly express the rules we have referred to:

> "1. It is possible for a state to authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities. Detroit v. Detroit Citizens' Ry. Co., 184 U. S. 368, 382, 22 S. Ct. 410, 46 L. Ed. 592; Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 508, 515, 27 S. Ct. 762, 51 L. Ed. 1155; Public Service Co. v. St. Cloud, 265 U. S. 352, 355, 44 S. Ct. 492. 68 L. Ed. 1050. And where a city, empowered by the state so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. Detroit v. Detroit Citizens' Ry. Co., supra, 184 U. S. 389, 22 S. Ct. 410, 46 L. Ed. 592. And, in such case, the courts may not relieve the utility from its obligation to serve at the agreed rates, however inadequate they may prove to be. Public Service Co. v. St. Cloud, supra.
>
> "This court is bound by the decisions of the highest courts of the states as to the powers of their municipalities. Georgia Ry. Co. v. Decatur, 262 U. S. 432, 438, 43 S. Ct. 613, 67 L. Ed. 1065. * * *
>
> 2. "But, assuming that the fares were established by the franchise contracts, we are of opinion that such contracts have been abrogated. The state had power upon the company's application, through its commission or otherwise, to terminate them. Pawhuska v. Pawhuska Oil & Gas Co., 250 U. S. 394, S. Ct. 526, 63 L. Ed. 1054; Trenton v. New Jersey, 262 U. S. 182 186, 43 S. Ct. 534, 67 L. Ed. 937, 29 A. L. R. 1471; Henderson Water Co. v. Corporation Commission, 269 U. S. 279, 46 S. Ct. 112, 70 L. Ed. 273; Denney v. Pacific Tel. Co., 276 U. S. 97, 48 S. Ct. 223, 72 L. Ed. 483."

We would refer you also to two cases in this state dealing with the same subject:

City of University Place v. Lincoln Gas & Electric Light Co., 109 Neb. 370, 191 N. W. 432 (1922).

Nebraska Gas & Electric Co. v. Stromsburg, 2 Fed. (2nd) 520 (8th Cir. Ct. App.).

In the University Place case, the court held:

> "Constitutional Law: GAS CONTRACT: IMPAIRMENT: An ordinance reciting 'that, in consideration of the rights and privileges granted herein, the grantees shall have a right to charge not in excess of $1.50 per 1,000 cubic feet of gas,' etc., which is accepted by the company, constitutes a contract the obligation of which may not be impaired by either party."

The court left undecided the question of the "paramount authority" of the state to interfere with such contracts. In this connection the court said:

> "The power to contract carries with it, as a necessary incident, the power to insert such terms and conditions as are appropriate and necessary, and are germane to the subject. What more important consideration, both to the citizens and the company, than the price that was to be charged for gas. **Let it also be borne in mind that we have no question here about the power of the legislature to regulate rates; the question arises between the company and a city which did not possess that power;** and what it did not possess it could no relinquish; therefore, the lack of mutuality referred to in Central Power Co. v. City of Kearney, 274 Fed. 253, is not present; and the contract may be valid between the parties, regardless of the question whether the state may, by the exercise of its paramount authority, interfere with its complete fulfilment (City of Manitowoc v. Manitowoc & Northern Traction Co., 145 Wis. 13), which we do not decide."

The constitution of this state expressly provides that, except in the case of corporations organized for charitable, educational, penal or reformatory purposes, all laws for the organization, regulation, supervision and general control of corporations must be general in nature. That is to say, special or individual charters are prohibited. This section of the constitution (Sec. 1, Art. XII) then concludes:

> "All general laws passed pursuant to this section may be altered from time to time, or repealed."

We, therefore, have in this state a powerful and comprehensive reservation of power in the state that cannot be ignored in questions

of this kind. It must not be overlooked, however, that this reserved power can be exercised only in such manner as not to violate other equally important constitutional provisions such as the "due process" and "impairment of contract" clauses of the state and federal constitutions.

You make mention, especially, of the proposal that the city of Omaha contract with a pipe line company to furnish natural gas to the city, such contract providing for maximum prices to be charged for the gas furnished.

This would, of course, be an interstate line. Assuming that the Metropolitan Utilities District (which would enter into such contract, after vote of the electors), has the power to enter into such contract, we have not only to consider this reserved power in the state of Nebraska, but also the power of the federal government to regulate interstate commerce. This power "to regulate commerce among the several states," though unexercised at the time such proposed contract may be entered into, would still be as potent as if no such contract had been made.

We have given you only a sketchy outline of the law involved. Any one of the points we have mentioned covers in itself a whole field of judicial inquiry and decision.

Yours very truly,
C. A. SORENSEN, Attorney General,
By L. ROSS NEWKIRK, Assistant Attorney General.

AGRICULTURAL SOCIETIES—APPROPRIATIONS—HOW AND WHEN PAID

February 5, 1930.

Mr. Julius D. Cronin,
County Attorney,
O'Neill, Nebr.
Dear Mr. Cronin:

Speaking with reference to appropriations of money for the support of county agricultural societies made in conformity with the provisions of Chapter 5, Session Laws of 1929, you say:

"The question that arises now thereunder is, how is the money appropriated for Fair purposes paid? Is the County Treasurer authorized to pay the same after the statement provided for in the Statute has been filed with the County Clerk or should a claim be filed and allowed by the county board before the Treasurer makes the payment?"

"When can the money be paid? Is it proper after the levy has been made to pay the money or should payment be held up until the taxes called for by the levy are actually paid into the Treasurer?"

I will endeavor to answer your questions in the order in which they are asked.

1. I am of the opinion that the county treasurer will be legally justified in paying the money over to the treasurer of the managing board of directors of a county fair without an order from the county board, if a county fair has been held for at least three days and if a sworn statement has been filed with the county clerk setting out the facts required to be set out by the concluding part of said Chapter 5.

I am of the opinion, however, that in order to avoid any question in regard to the matter, it will be well to have the county board allow the claim for it.

2. I am of the opinion that it is proper after the levy has been made and the fair held, to allow a claim or claims for the money up to 85 per cent of the levy, even though the money has not all been paid in.

Very truly yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

FINES—POWER OF COURTS TO REMIT

February 6, 1930.

Mr. Claude O. McCoy,
865 North 26th Street,
Lincoln, Nebraska.
Dear Sir:

This is in answer to your kind letter of February 4, 1930, requesting information as to the authority of a court before whom one is convicted of an offense, including liquor offenses, to remit the fine or reduce sentence after the same has been once judicially pronounced.

Sections 10174 to 10176, Compiled Statutes of Nebraska for 1922 give the court authority before pronouncing sentence and without pronouncing sentence to put offenders as above described on probation.

But after sentence is pronounced, it seems that all power and authority of the court to change the sentence in any way ceases and that such power belongs to the Board of Pardons, as provided by the following language of Section 10233, Compiled Statutes of Nebraska for 1922:

> "The board of pardons shall have jurisdiction to grant or deny pardons, paroles, commutations, reprieves and the remission of fines or forfeitures. No person shall be released nor shall any fines or forfeitures be remitted under the guise of

any other procedure or on the purport of any other document except such as are specifically prescribed in this act."

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

LINE FENCES—LAW GOVERNING

March 18, 1930.

Mrs. Maude Bertrand,
Niobrara, Nebraska.
Dear Madam:

In your letter of March 14, 1930, you state and inquire:

> "Will you please tell me what the law is in regard to division fence line—when a three wire fence has been on a section line for about twenty-five years—the land on the north side was purchased by the present owner about ten years ago, and we purchased the land on the south side last year, now if the section line is opened who does the fence belong to. Both parties have a warranty deed and nothing was said about the fence."

Whichever one of the adjoining owners originally built the line fence, might have collected from the other adjoining owner one-half its cost, and then both adjoining owners would have each owned one-half of the fence (Sec. 2419, Compiled Statutes, 1922).

But in the absence of an agreement, statute or prescription for joint ownership, the fence belongs to the owner of the land on which it rests and passes with a conveyance of the land to the grantees as a fixture (25 Corpus Juris 1033, Notes 68 and 69; 26 Corpus Juris 673, Notes 54 to 56).

Assuming that the fence you refer to is right on the line, it belongs to the present grantee of the owner who built it, unless originally built by agreed or statutory contribution of both adjoining owners, in which case, the present grantees of both said adjoining owners would own the fence.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

COUNTY COURTS—ONLY ATTORNEYS CAN PRACTICE IN

May 9, 1930.

Mr. W. W. Cornell,
Pawnee City Nebr.,
Dear Sir:

In answer to your letter of May 3 you are advised that it is unlawful in this state for anyone to practice law before county courts of this state without a license. Your attention is called especially to the case of Scott v. Flowers, 61 Neb. 620, in which it is held:

> "The county court is always and under all circumstances a court of record. The county judge, in whatever official capacity he may act, is a judge of a court of record; he is not a justice of the peace even when exercising the ordinary powers and jurisdiction of a justice."

Sec. 16, Art. V, of the Constitution and Sec. 1127, Compiled Statutes of Nebraska, 1922, make the county court a court of record. Sec. 260, Compiled Statutes of Nebraska, 1922 requires admission to the bar as a prerequisite for practice "In any court of record in this state."

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

PATENT MEDICINES—RIGHT OF GROCERIES TO SELL

June 10, 1930.

Mr. H. Shamberg,
401 E. Overland Drive,
Scottsbluff, Nebraska.
Dear Sir:

In your letter of May 27 you ask whether grocery stores are permitted to handle patent medicines.

Sec 121, Chapter 167, Laws 1927, authorizes any person to sell any patent or proprietary medicine which is not in itself a violation of the law relating to intoxicating liquors.

We understand this provision to mean that grocery stores or other stores or individuals may lawfully sell patent medicines or proprietary medicines if such medicines do not contain alcohol or if, in cases where they do contain alcohol, they also contain other ingredients which make them unfit for use as a beverage.

In this connection it is perhaps proper to call attention to the fact that Section 3260, Compiled Statutes of Nebraska, 1922, as amended

by Chapter 155, Laws 1929, requires every person, whether a druggist or not, who sells or gives away any proprietary medicine which contains sufficient alcohol to produce intoxication, to register in a book kept for that purpose, the name and address of the person obtaining the same, the date of the sale and the quantity sold or given away. This book must be kept open to inspection at all times during business hours to the governor, county attorney of the county or any other public officer. The same act also makes it a criminal offense for any person to sell or give away any patent or proprietary medicine or other medical compound or preparation which contains sufficient alcohol to be used for purposes of intoxication, knowing or having a reasonable ground to believe that such medicine is being purchased for use as a beverage.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

BOOK ACCOUNTS—ADVERTISING FOR SALE—LEGALITY

June 16, 1930.

Mr. John R. Simpson, Cashier,
The Harvard State Bank,
Harvard, Nebraska.
Dear Sir:

This is in answer to your kind letter of June 6, 1930, requesting to be informed as to what this office thinks of the practice of advertising accounts for sale.

The unsoundness of this practice is apparent on the face of it. If the account offered for sale was any good, the creditor and his agent wouldn't want to sell it. And, if the account offered for sale is no good, as the debtor perhaps knows as well, if not better, than the creditor, then the obvious purpose of the creditor and his agent in advertising it for sale is to tell the world that the debtor is a dead-beat. In so doing the creditor and his collecting agent expose themselves to a civil action for damages for defamation (Masters v. Lee, 39 Neb. 574).

But, unsound as it is, this business practice is not condemned by any criminal statute of this state. It is not blackmail because the threat involved is to do what the threatener has a legal right to do, viz., sell his own or his principal's property,—the debtor's account. Until the legislature passes a law against advertising accounts for sale, there is nothing the attorney general can do about the matter except to give the movement for the passage of such a law the benefit of his moral support. This, of course, we have consistently done.

With kind personal regards, we are
Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

BONDS—RIGHT OF COUNTY TO VOTE FOR PAVED ROADS

February 15, 1930.

Mr. H. J. Dollinger, Secretary,
Scottsbluff Chamber of Commerce,
Scottsbluff, Nebraska.

Dear Sir:
You say:

"We would like to know whether or not under the present statutes it is possible for the county of Scotts Bluff to vote bonds for the purpose of building paved roads in the county.

"We would also like to know, provided it is permissible to so bond, if the money derived through these bonds can be used in conjunction with state and federal funds for the building of paved roads in this county."

I will answer your questions in the order in which they are asked.

1. In my opinion it is permissible under the statutes as they now exist to vote county bonds for the purpose of building paved roads in a county. I take it that a paved road is a work of internal improvement and Section 322, Compiled Statutes, 1922, provides that

"Any County * * * in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any * * * work of internal improvement."

The law provides however, that the question of the issue of the bonds shall be submitted to a vote of the electors of the county and the amount of the issue can not exceed ten per cent (now two per cent. See Section 5912, Compiled Statutes) of the assessed valuation of the county.

2. I am of the opinion that the money received from the issue of such bonds can be used on county highways even though the state or the federal government should use money on the same highways for the same purpose, but, I do not think that either the state or the federal government will assist in paving any highways except state highways.

I doubt the legal right of a county to bond itself to pay for paving a state highway. Section 8336, Compiled Statutes as amended by Chapter 187, Laws of 1927, makes it the duty of the state department of public

works to maintain the whole of the state highway system except such portions as lie within the corporate limits of cities and villages having a population of more than 2500 inhabitants.

Very truly yours,
C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

LIQUOR LAW VIOLATOR—ARREST WITHOUT WARRANT—"REASONABLE" AMOUNT

July 5, 1930.

Mrs. Mable Northrop,
1619 9th Ave.,
Scotts Bluff, Nebraska.
Dear Madam:

Governor Weaver has referred to this department for reply to your kind letter of July 1, 1930, requesting information as to the power of an officer to arrest a person without a warrant and as to the right of a person to have intoxicating liquor in his possession at his home for his personal use.

In this connection permit us to say that in liquor cases as well as in other cases, the officer makes arrest and searches without a warrant at his own risk as to the identity of the offender and the fact and the character of his offense; and makes searches at his own risk of finding contraband goods on the premises thus searched without a warrant. When he performs these acts without a warrant and proves to be mistaken as to the offender, the offense or the presence of contraband goods on the premises, he subjects himself to a personal liability for false arrest, trespass or other tort as the case may be.

There is a right to have in one's possession at his dwelling house for his personal use a reasonable amount of intoxicating liquor including beer; provided the same was obtained prior to May 1st, 1917, when the present liquor law took effect. But there is no lawful manner in which one can acquire liquor for his personal use since May 1st, 1917. Since there is mighty little liquor left that was obtained before May 1st, 1917, the cases in which the possession of it for personal use is lawful are of course very scarce (Laws 1923, Chapter 94; McLaughlin v. State, 104 Neb. 393). These laws and court decisions are too lengthy to be set out here, but any attorney or public official of your county will be pleased to give you access to them.

With kind personal regards, we are

Sincerely yours,
C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

STOP SIGNS—RIGHT OF VILLAGE TO PLACE IN FEDERAL HIGHWAY

July 16, 1930.

Mr. George C. Porter,
Attorney at Law,
Morrill, Nebraska
Dear Sir:

Your letter of June 6, 1930, with reference to the right of the Village of Morrill to put stop signs on the national highway running through Morrill has been considered at length by this department. Four of my assistants have prepared extensive opinions on the subject. It is a question on which the courts will probably disagree.

We have finally come to the conclusion that the town has the authority to put in stop signs if they are actually needed for the safety of people crossing the street.

Section 4316, Compiled Statutes for 1922 gives to a village the care, supervision and control of all public highways within the village, and Section 4306 gives to the village power to regulate traffic on streets and highways within the village.

It is true that Section 8347 grants authority to the state highway department to make regulations to promote public safety and preserve the highways as to state highways, but Section 8390, passed as a part of the same act provides that nothing in the act shall be construed to limit the power of local authorities to make, enforce and maintain any ordinances, rules or regulations, in addition to the provisions affecting motor vehicles.

Chapter 146, Laws 1929, grants to the highway department authority to erect and maintain red flares, warning signs or stop signs on hazardous roads entering or crossing state highways, etc., but I do not construe this provision to be in any way derogatory of the powers already conferred on villages to regulate traffic on their streets and highways.

The right of the legislature to delegate power to impose reasonable and impartial regulations for use of its streets and highways to municipal corporations has been upheld in Omaha, etc., R. Co. v. City of Omaha, 114 Neb. 483, and in Christensen v. Tate, 87 Neb. 848, 128 N. W. 622, it was held that the fact that the legislature had provided limitations on the speed of vehicles on streets and highways did not prevent a city, under the authority granted it by the legislature to regulate its streets, to impose still further restrictions on the speed of vehicles pro-

vided such restrictions were reasonable and necessary and do not prohibit the free use of the streets.

The legislature has delegated authority to the villages of Nebraska to regulate traffic on their streets and highways. It has also undertaken to clothe the highway department with power to regulate traffic on state highways. There is not necessarily any conflict between the powers delegated to these two governmental agencies as far as the legislative enactments are concerned, and can be no conflict except in cases where the highway department undertakes to step over into a village and undertake to enact rules and regulations which conflict with village ordinances. The right of the legislature to delegate traffic functions, such as rule making for highway traffic to a municipal corporation is unquestioned, Omaha, etc., R. Co. v. Omaha, supra, but it is equally clear that the legislature can not delegate legislative powers to an executive officer or department. When the village by an act of legislation puts stop buttons in its streets and highways, it seems very doubtful if the highway department, under the guise of performing a purely ministerial act, which is all it legally can perform, can nullify and set aside such ordinance of the village.

It seems to me that Chapter 146, Laws 1929, does not repeal by implication, because it does not conflict with the statutes granting to villages the right to control and regulate their streets.

The right to build and maintain a state highway through a village does not in our opinion give to the state highway department exclusive power to regulate traffic on such highway within the village. I do not think that the right to build and maintain the highway necessarily carries with it the right to regulate traffic in the face of the positive statutes granting that right to the village. The legislature may very well order one of its creatures (the highway department) to build and maintain a highway, and empower another of its creatures (the village) to regulate traffic within its territorial limits on the same highway. This is what I think the legislature has done.

I would not say that the state highway department has no authority to make regulations governing traffic on state highways even in villages, but in case of conflict between its regulations and those of a village, I think the rules of the state highway department must yield in the present state of the laws on the subject to the village if the regulations of the village are reasonable and actually calculated to make traffic more safe. School signs are good illustration. Cannot a town protect its school children by requiring all automobile owners on a state highway to stop when passing school house? We think so.

We enclose two letters from Mr. C. L. Rein, Assistant Attorney

General on the subject. These letters are very persuasive and may be the law but for the present at least this department takes the other point of view for the reasons given above.

Very truly yours,

C. A. SORENSEN, Attorney General.

PAUPERS—LIABILITY OF COUNTY TO SUPPORT

March 18, 1930.

Mr. Dana R. Williams,
County Attorney,
Albion, Nebraska.
Dear Sir:

This is in answer to your letter of March 13, 1930, requesting information concerning Boone County's liability for support of a woman and children, resident in Boone County for two years, but formerly resident in Platte County where the woman obtained a mother's pension which was paid to her in Boone County until recently.

The Mother's Pension Law (Secs. 3474-3484 and Laws 1927, Ch. 149, Page 401) is, of course, separate and distinct legislation from the Pauper's Act (Secs. 5140-5167), and liabilities under the one are in no way made to depend or be affected by liabilities under the other.

Sec. 5144 definitely casts upon the county of pauper's domicile liability for their support. Sec. 5150 provides that such pauper shall be so chargeable in the county wherein he or she resided at the commencement of thirty days immediately preceding such person becoming so chargeable. It appearing from your letter that the woman and children, referred to in your letter, have resided in Boone County for more than thirty days, Boone County has the liability for their support provided by the Pauper Act.

With kind personal regards, we are

Sincrely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

X-RAY—RIGHT OF OSTEOPATHS AND CHIROPRACTORS TO GIVE TREATMENTS

March 18, 1930.

Dr. B. F. Brown,
Edgar, Nebraska.
Dear Sir:

We are in receipt of a letter from you in which you refer to an opinion supposed to have been given by this department regarding the taking and diagnosing of X-ray pictures by physicians and surgeons. You ask if osteopaths and chiropractors may lawfully, in our opinion, do X-ray work.

It is our opinion, as already expressed on several occasions, that a duly licensed osteopath or chiropractor may take X-ray photographs for purposes of diagnosis, and it is conceivable that situations might arise where such practitioners would be entitled to give X-ray treatments provided such treatments could be said to come within the scope or definition of such treatments given in the general licensure law Chapter 167, Session Laws of 1927. Under ordinary circumstances, however, it is our opinion that an osteopath or a chiropractor is not authorized by his license to treat diseases by means of the X-ray.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

HIGH SCHOOLS—RIGHT TO FREE TUITION

March 22, 1930.

Hon. Charles W. Taylor,
State Superintendent,
Lincoln, Nebr.
Dear Sir:

You quote from a letter received by you as follows:

> "I am writing you in regard to obtaining free high school tuition for my daughter, who is a pupil in Whittier Junior High School, in Lincoln. She has completed all of her schooling in the Lincoln Schools with the exception of the third grade and will complete her eighth grade in June. We live in a rural district and have paid tuition these past years and are now paying tuition.
>
> "Now that she is ready for high school we feel that we are entitled to the free high school tuition, without taking the state wide county examinations for the reason she is completing the eighth grade in a satisfactory manner at Whittier. Understand she has never been a pupil of the rural school, except the third grade.
>
> "We superintend the Lancaster County Farm."

and you ask for an opinion from this office upon the question raised by by this letter.

Complying with the request for an opinion, I will say the law does not provide for the granting of free public high school education to any rural pupil in the ninth grade unless that pupil has a statement signed by the county superintendent that he or she has passed the necessary examination with a seventy-five per cent average in all subjects required for a second grade certificate. The exact wording of the statutory requirement in this respect is as follows:

> "Every pupil to be entitled under the provisions of this article to free public high school education in the ninth grade of any public school district maintaining such grade must have a statement signed by the county superintendent that he has passed the necessary examination with a 75% average in all subjects required for a second grade certificate, viz.: Agriculture, bookkeeping, civics, drawing, arithmetic, English composition, geography, grammar, history, mental arithmetic, orthography, penmanship, physiology, reading, and that he is unable to secure ninth grade work in the public school district of his residence."
>
> Section 6385, C. S. 1922.

Doubtless the law might well provide that a certificate from an accredited school that the pupil had taken the eighth grade work in that school and was qualified to take up the work of the ninth grade should be considered as an equivalent to the examination of rural pupils.

Respectfully submitted,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

SCHOOL DISTRICT—INVESTMENT OF FUNDS

August 29, 1930.

Mr. H. E. Patch,
County Treasurer,
Bassett, Nebraska.
Dear Sir:

You say:

> "School District No. 18 of Newport, in Rock County, has a sinking fund of $3338.00 for a bond of $6,400.00 due June 1st 1933 and they wish to invest this in the General Fund Warrants 1933 and they wish to invest this in the General Fund Warrants of the district."

And you inquire:

"Would this be legal from my standpoint?
"If so, what would be the method of procedure?

"I presume I would have custody of the warrants, and charge them against this fund.

"Should the General Fund pay the interest and credit it to the sinking fund?"

In answer to the question you ask, I will say that in my opinion such an investment may legally be made and in case it is made I think that you will retain the custody of the warrants until they are paid and that interest on the warrants will be paid out of the funds against which they are drawn and will go to swell the sinking fund out of which the bonds will eventually be paid.

I arrive at this conclusion by construing together Sections 375 and 6204, Compiled Statutes which read respectively as follows:

"It shall be the duty of the county board in each county to levy annually upon all the taxable property in each school district in such county, a tax sufficient to pay the interest accruing upon any bonds issued by such school district, and to provide a sinking fund for the final redemption of the same, such levy to be made with the annual levy of the county, and the taxes collected with other taxes, and when collected shall be and remain in the hands of the county treasurer a specific fund for the payment of the interest upon such bonds, and for the final payment of the same at maturity. It shall be the duty of the county clerk to furnish a copy of his register to the county treasurer."

Sec. 375.

"The school board of any school district in this state is hereby authorized to direct the legal custodian of any of its sinking funds to invest such sinking funds in the warrants of such school district in like manner as hereinbefore provided for: Provided, the investment of such school district sinking fund under this section shall be limited to the warrants of its own issue, and upon such direction of the school board, the custodian of such sinking funds shall proceed to take up the warrants of such school district as herein provided for."

Sec. 6204.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

INTANGIBLE TAX—CORPORATIONS—HOW ASSESSED

April 4, 1930.

Mr. Thomas J. Dredla,
County Attorney,
Wilber, Nebraska.
Dear Sir:

The intangible tax law provides that the value of shares of stock in corporations organized under the laws of this state shall be taxed at eight mills on the dollar of its value but it also provides that the value of such shares shall be determined "by deducting from the actual value of the paid up capital stock, surplus and undivided profits of such corporation available for stock dividends, the assessed value of the property of the corporation, both intangible and tangible, listed and taxed in this state and the actual value of the property of the corporation outside of this state."

The law further provides that the corporation shall furnish the assessor or state tax commissioner such proof of the actual value of its property outside of the state as they may require.

I am of the opinion that shares of stock in the Fairmont Creamery Company of Delaware if it is domesticated in this state as I am informed that it is, will be taxed as shares of stock in a corporation organized under the laws of this state and their value will be determined in conformity with the plan above outlined.

If, however, it is regarded as a foreign corporation its shares of stock will be valued in conformity with the provisions of Section 5886, Compiled Statutes as amended by Chapter 173, Session Laws of 1925. In any event the shares of stock will be taxed as intangible property.

You will note that Section 3 of Chapter 168, Session Laws of 1929 provides that every owner of intangible property shall make a return under oath for taxation purposes of the intangible property he owns, and if he fails to do so, Section 4 of the same act provides that the omitted intangible property shall be taxed at the same rate that tangible property is taxed in the taxing district in which the owner resides. Another section of the same act makes it a misdemeanor to neglect or refuse to make the return.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

ASSESSOR—PRECINCT—DUTIES

January 13, 1930.

Mr. C. D. Keyes,
County Assessor,
O'Neil, Nebr.
Dear Sir:

In answer to your inquiry as to who should assess real estate in O'Neil permit us to say that, in our opinion, this work should be done by the duly elected, qualified and acting precinct assessor of Gratton Precinct wherein O'Neill is located. (Laws, 1927, Ch. 102, Page 282).

You state that no assessors were elected, under the above cited law, for the wards of O'Neil. You also state that O'Neil has elected a city assessor, but we find no law providing for such an office. Under said Laws 1927, Ch. 102, you can appoint persons to fill vacancies in the office of precinct assessor; and can also appoint persons to assess the property in every city of your county having over 4,000 people. But we fail to find that O'Neil has over 4,000 people. It thus appears that, conformably to law, the Gratton Precinct assessor is the appropriate party to do the assessing in O'Neil. His work is, of course, subject to correction and review by yourself and the board of equalization, as provided by law.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

TOWNSHIP—RIGHT TO VOTE TAXES FOR LIBRARY

January 14, 1930.

Mr. E. T. Larson,
Township Treasurer,
Sargent, Nebraska.

This is in answer to your letter of January 10, 1930, requesting information as to the power of the electors present at the annual town meeting to vote taxes for library, cemetery and community building purposes.

Under Section 3185, Compiled Statutes of Nebraska, 1922, the town meeting is authorized to establish a township library and levy a tax therefor of five mills, which, under present tax laws, requiring full valuation of property, is one mill.

Under Laws, 1927, Ch. 58, Page 220 and Laws, 1927, Ch. 170, Page 504, the town meeting may provide for the township cemetery, the levy for which, together with all other purposes, except roads, bridges and

libraries, for which special levies are provided, shall not exceed three-fifths of a mill actual value.

Except as implied from the general power to own real estate we find no specific power to provide a township community building. The levy for such building would have to be within the three-fifths of a mill actual value provided by Laws, 1927, Ch. 170, "for other purposes" except roads, bridges and libraries, for which special provision is made.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

TAXES—CONDITIONAL SALES CONTRACT

February 13, 1930.

Hon. R. H. Rice,
County Attorney,
Neligh, Nebraska.
Dear Sir:

From your letter of January 28, 1930, the following facts appear:

On April 1, 1927, the Coles of Neligh were in possession of personal property consisting of cafe furniture and fixtures. The Coles had possession under a conditional sales contract reserving title in the seller, Omaha Fixture and Supply Company, until the goods were fully paid for. On April 6, 1927, when the Coles were in default on said contract, this property was assessed for 1927 taxation to Mrs. Myrtle Cole. On May 31, 1927, this property was transferred to H. C. Livingston who has since possessed it under a conditional sales contract reserving title in the seller, Omaha Fixture and Supply Company, until the goods are fully paid for. On August 9, 1927, taxes were levied against said Myrtle Cole on the assessment of said goods against her of April 6, 1927. The taxes on said goods have ever since remained unpaid. Because Myrtle Cole and husband now are and always have been insolvent, no distress warrant has been issued against either of them for the collection of said taxes.

You inquire:

> "Is there any way in which we can collect these taxes and if so from whom and how?"

Your query presents some nice questions of law which are by no means free from doubt.

It seems clear, however, that, under the state of facts you give, Livingston could not be compelled to pay this tax; he having purchased and taken possession of the property after it was assessed but before a lien for taxes had attached against the property.

The general rule on this point is stated in a note to Wilberg v. Yakima County (Wash.) 231 P. 931, found in 41 A. L. R. 192, as follows:

> "There is no personal liability incurred by a purchaser for taxes assessed against his seller, even though he takes subject to a lien for their payment. The lien is the only charge against him, and extends only to the property bought; it does not attach to any other goods he may possess or acquire."

The same note (page 188) also says: "Ordinarily there is no liability incurred by the purchaser of personal property to pay a tax assessed against the former owner; and if no lien for it exists against the property purchased at the time of sale, it is not subject to seizure in the hands of the buyer."

The question whether Mrs. Cole, the buyer under the conditional sales contract, is liable for these taxes is not so clear. The question of whether the buyer or seller, or both, under a conditional sales contract reserving legal title in the seller until the purchase price is fully paid, is liable for taxes seems never to have been passed upon by our supreme court. Courts that have passed on the question are seemingly not in entire agreement.

It is the general rule, as frequently announced by our supreme court, that personal property is taxable to its owner. Dunnegan v. Jensen, 112 Neb. 266, 199 N. W. 722; In re Jones Assessment, 105 Neb. 705, 181 N. W. 652. Our court has also held in the case of Union Stock Yards Nat. Bank v. Thurston Co., 65 Neb. 410, 92 N. W. 1022, that the owner of personal property within the meaning of the tax law is the person who has the legal title thereto.

In the latter case, however, taxes on certain cattle were assessed against the bank which had a chattel mortgage on them, the mortgagor retaining both the legal title and possession. The court held that the taxes should have been assessed against the mortgagor. We doubt if this case would support the proposition that, in cases of conditional sales where possession and beneficial use of the property go to the buyer, the seller retaining only the bare legal title as security for payment of the purchase price, the tax must be assessed against the seller and not the buyer. Many courts have held that location of the legal title does not necessarily control in determining ownership for taxation purposes. U. S. Shipping Board v. Delaware County, 17 Fed. (2nd)

40; King County v. U. S. Shipping Board, 282 Fed. 950; State v. Hughes Bros. Timber Co., 272 U. S. 469, 47 S. Ct. 170; 71 L. Ed. 359.

Cooley in his work on taxation, 4th ed. Vol. 2, p. 1261, Sec. 587, says:

> "The person in possession of personal property is presumed to be the owner thereof, for purposes of taxation."

On the specific question raised in the case you present Cooley says (Taxation, 4th ed., Vol. 3, page 2219, Sec. 1097):

> "In case of a conditional sale, personal property is generally assessed to the buyer."

In the case of Singer Sewing Machine Co. v. Cooper, 263 Fed. 994, it was held:

> "Purchaser of a chattel under a conditional sales contract acquires an interest in it which is, as against all the world except the vendor, ownership."

It was held in this case that taxes on sewing machines purchased under conditional sales contracts were properly assessable against the buyer and not the seller.

It was also held in the case of State v. White Furniture Co., 18 Ala. App. 249, 90 So. 895, that:

> "Under Acts 1919, p. 283, Sec. 2, exempting 'solvent creditors' from taxation, credits arising out of conditional sales of goods, title to which is retained by the seller as security for payment, are exempt; the purchasers being the owners of the property, subject only to the seller's option to assert his reserve title."

On the general question of ownership for taxation purposes, 37 Cyc. 788, says:

> "Ordinarily and in the absence of statute to the contrary, property is taxable only to the person who is the owner thereof at the date of its listing or assessment, or the date fixed by statute or of which its ownership for purposes of taxation is to be determined; and taxes are not a lawful charge on property unless assessed in the name of its owner and any attempt to enforce the payment of taxes assessed and charged to the wrong person will be ineffective. This does not mean that the person assessed must have a perfect and unencumbered title to the property, but only that he should be vested with the apparent legal title, or with the possession coupled with such claims and

> evidences of ownership as will justify the assumption that he is the owner; and assessors are not required to go behind the records and search out unrecorded transfers or anticipate the judicial settlement of a title which is in litigation."

From the foregoing authorities and others which lack of space forbids us to include, we believe that our courts would hold that a purchaser in possession of chattels under a conditional sales contract on April 1st is liable for the taxes assessed against such chattels, and that, in this case, Mrs. Cole is liable. We are fortified in this opinion by the fact, as we are informed, it has been the universal custom of assessors in this state for years, to assess such taxes against the buyer in possession of the property, and courts are ordinarily slow to overthrow customs of this nature when to do so would mean the disorganization of one of the most vital functions of government.

We do not think, however, that, in the instant case, it necessarily follows that because the taxes on these fixtures were properly assessed against Mrs. Cole, they cannot therefore be recovered from the Omaha Fixture and Supply Company. While a suit for this purpose would certainly be difficult and the outcome perhaps doubtful, we do not regard it, in the light of the reported decisions and authorities, as being by any means hopeless.

It is sound public policy that all property not specifically exempted, should be compelled to bear its share of the burden of taxation. In State v. Omaha County Club, 78 Neb. 178, 110 N. W. 693, our supreme court said:

> "Courts will not aid in the depletion of the public revenues by permitting private property to escape taxation, except in obedience to positive law."

Cooley in his work on Taxation from which we have already quoted says (4th ed., Vol. 2, p. 1274, Sec. 603):

> "The duty to pay taxes as between vendor and vendee may be regulated by contract, so far as ultimate liability therefor as between the parties is concerned, but this does not necessarily affect the primary liability to the state. The legislature may authorize the assessment either to the vendor as legal owner or to a purchaser in possession; and when a purchaser is to be deemed the owner for the purposes of taxation is sometimes dependent upon the terms of the tax statute."

Our own statutes indicate clearly enough that taxes on property are to be assessed against the owner, but it is left to the courts to decide

who the owner is in cases like the present one where more than one party owns an interest in the property. As already noted, our supreme court has held that the owner of personal property within the meaning of the tax laws is the person who has the legal title thereto. Union Stock Yards Co. v. Thurston County, 65 Neb. 408, 92 N. W. 1022. Our court has also held that under conditional sales contracts reserving title in the seller until the goods are paid for, the legal title to the goods is in the seller. Wilson v. Lewis, 63 Neb. 617, 621; 88 N. W. 690; McCormick etc. Co. v. Mills, 64 Neb. 166, 89 N. W. 621; and there is no reason to think it would not adhere to that rule although conditional sales are not favored in law. 24 R. C. L. 446, Sec. 744.

In the case of Robertson v. Puffer Mfg. Co., 112 Miss. 890, 73 So. 804, the supreme court of Mississippi, after quoting from Cooley on Taxation, used the following language:

> "If Judge Cooley is right, the property should be assessed to the seller of the property, for the reason that the legal title to the property was to remain in the seller until the purchaser complied with the terms of his contract. For purposes of taxation the state is not required to adjust the equities between the contracting parties, the taxing board seeks the legal owner, and when he is found, the property is assessed to him. Any other rule, it seems to us, would place upon the taxing authorities an intolerable burden and lead to complications and entanglements which would be impossible of solution, and from which the most learned chancellor might shrink."

In Jordan v. Baggett, 37 Ga. App. 537, 140 S. E. 902, decided in 1927, the supreme court of Georgia held:

> "As between the parties to a conditional sale of personalty, the purchaser in possession is the one liable for the taxes, but the public authorities may treat the property as belonging indifferently to either the purchaser or the seller, and may proceed to assess and collect the taxes accordingly."

From a consideration of these authorities it seems to us that our courts might well take the view that the taxes on the cafe fixtures, in the case you mention, might properly have been taxed either to Mrs. Cole or to the Omaha Fixture and Supply Co. on April 6, 1927. As a matter of fact, on the date the assessment was made Mrs. Cole was in default under her contract, and the Omaha Fixture and Supply Co. not only held the legal title to the property but had the legal right to its possession—a right which it shortly afterward exercised. Had the Omaha company taken possession of this property on April 1, as apparently it had a legal right to do, there could be no question of its liability for these taxes. It seems hardly fair that it should avoid this obligation

and that this property should escape its just burden of taxation because the company delayed a few days in exercising its legal rights. Public policy demands that all property alike, except that legally exempted shall bear the burden of taxation. We think, therefore, that there is a reasonable possibility that our courts would hold the Omaha Fixture and Supply Co. liable for this tax.

As to the enforcement of this obligation, we find no constitutional or statutory limitation on the authority of the public powers to exact payment of taxes for a past year on property which by mistake or design escaped the assessment rolls and taxation for that year. 27 R. C. L. 351, Secs. 8511, 8524; Price v. Lancaster County, 18 Neb. 199, 24 N. W. 705; State v. Stanton County, 100 Neb. 747, 161 N. W. 264.

The assessment for the year 1927, however, is still subject to correction so that it will not escape taxation, by giving notice and apportunity for hearing to the taxpayer as provided in section 5963, 5972 and 5973, Comp. Stat. 1922.

Should your county care to attempt to collect this tax from the Omaha Fixture and Supply Company, we suggest that your county board of equalization give notice to the Omaha Fixture and Supply Company to appear at a time and place stated in said notice to show cause why the assessment of said personal property for the 1927 tax should not be corrected by cancelling the assessment thereof against the Coles and assessing it against the Omaha Fixture and Supply Company. On the day fixed, after hearing or on default of the company, the board, if it thought proper, could order the correction to be made, which order would, of course, be subject to appeal to the proper court. Should the company fail to appear as provided in Section 5975, Comp. Stat. 1922, or should the final decision on appeal be adverse to it, the tax could be collected by the regular legal process for collecting taxes.

We shall be glad to give you any further assistance we can in this manner.

Very truly yours,
C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

TAXATION—OF STOCK OF FOREIGN CORPORATIONS

May 1, 1930.

Fradenburg & Matthews,
Keeline Building,
Omaha, Nebraska.
Gentlemen:

In your letter of April 18, 1930, you ask our opinion as follows:

1. "As a general rule the capital stock of a foreign cor-

poration is taxable when owned by residents of this state as intangible property. We would like to know, would the capital stock of a foreign corporation be taxable when owned by residents of this state, if such foreign corporation owned no assets except the capital stock of a Nebraska corporation which is taxed in this state?

2. "Suppose further, that a portion of the property of the Nebraska corporation were located outside the State of Nebraska and for that reason was exempt from taxation in the State of Nebraska. Would the fact that the Nebraska corporation did not pay all its taxes in the State of Nebraska in any manner affect the exemption of the capital stock of the foreign corporation which owned all of the capital stock of the Nebraska corporation?

3. "We would like to know also, if the owners of shares of stock in a foreign corporation, the assets of which consist of shares of stock in a Nebraska corporation, which Nebraska corporation owned property in the State of Nebraska and property outside of the State of Nebraska, in case, in your opinion, the shares of stock in such foreign corporation are not exempt from taxes when owned by residents in this state, would the owners of such shares of stock be entitled to deduct from the value of their shares of stock, the value of the property on which the subsidiary Nebraska corporation paid taxes in the State of Nebraska when listing such shares of stock for taxation as intangible property?"

Section 5886, Compiled Statutes of Nebraska, 1922, as amended by Chapter 173, Laws 1925, provides:

"If any foreign corporation is taxed in this state upon any tangible or intangible property, then the value of its gross shares of stock shall be ascertained by deducting from the actual value of such foreign corporation's paid up capital stock, surplus and undivided profits, the assessed value of its property taxed in this state, and thereafter the taxing officials of counties in which shares of stock of any such foreign corporation may be owned shall determine, in relation to such net value of the gross shares of stock, the value for assessment and taxation purposes of any such individual shares of stock in the hands of the resident owners."

It is our opinion in answer to your number one that the assessed value of the stock of a foreign holding corporation which owns the stock of a Nebraska corporation is arrived at by deducting from the actual

value of such foreign corporation's stock the assessed value of the stock of the Nebraska corporation. For example, assuming that the assessed value of a Nebraska corporation's stock is $50.00 per share and the value of the foreign corporation's stock is $100.00 per share, $50.00 per share is deductible for taxation purposes by the resident holder of such foreign corporation's stock. For the purposes of this computation the deductions made by the Nebraska corporation in arriving at the assessed value of its stock have no significance. The only concern of the resident taxpayer who owns stock of the holding company is that there be deducted from the actual value of his stock the proportionate value of the stock of the domestic corporation upon which the holding company has actually paid taxes in this state.

Even if the actual value of the domestic corporation's stock is as great as that of the foreign holding company's stock the only tax to the foreign corporation on its holdings is based on the assessed value of the same which may be much less than the actual value due to deductions allowed under the provisions of the intangible tax laws, as follows:

> "Provided, that the value of the shares of stock of corporations organized under the laws of this state shall be determined for the purpose of this section by deducting from the actual value of the paid up capital stock, surplus and undivided profits of such capital stock, surplus and undivided profits of such corporation available for stock dividends, the assessed value of the property of the corporation, both intangible and tangible, listed and taxed in this state and the actual value of the property of the corporation outside of this state."
>
> Laws 1929, Ch. 168, Sec. 1, Class B.

There is no doubt taxation to the holding company because it has derived the benefits of the deductions made in arriving at the assessed value of the domestic corporation's stock owned by it, therefore, there is no double taxation to the holder of the holding company's stock, even though the net assessed value of his stock represents, in a sense, a value upon which the domestic corporation has been assessed. For example, assume that the stock of the domestic corporation and also that of the foreign corporation has an actual value of $100.00 per share; and that deductions of values of the domestic company's real estate and its other property otherwise assessed result in an assessed value of $50.00 pershare on its stock. This $50.00 assessed value is in turn deductible from the value of the foreign corporation's stock held by the Nebraska taxpayer. He has to pay the taxes on the difference, which is $50.00. This $50.00, in a sense, represents the same value upon which the

domestic corporation has paid real estate or other property taxes. That, however, is not double taxation or at least such double taxation as the policy of our laws prohibits.

It was held in Nemaha County Bank v. County Board, 103 Neb. 53, 170 N. W. 500; Creighton Nat. Bank v. Knox County, 108 Neb. 610, 188 N. W. 301; and Kilkenney Realty Co. v. Douglas County, 116 Neb. 769, 219 N. W. 140, that the value of mortgages owned by a corporation, even though the mortgagor has agreed to pay the tax levied upon the mortgage interest should not be deducted from the value of the capital stock for taxation purposes. The court in those cases clearly pointed out that the "only property which can be deducted in arriving at the value of the shares of stock is that property upon which the corporation has paid or is required to pay the tax."

The mortgagee corporation not having paid a separate tax on its mortgage could not deduct the value of the mortgage from the value of its capital stock.

The rules we have followed in no wise conflict with the holdings in City Trust Co. v. Douglas County, 101 Neb. 791, 165 N. W. 155 and Peters Trust Co. v. Douglas County, 113 Neb. 596, 203 N. W. 1001.

Our answer to your inquiries, by number, is, trerefore:

No. 1. Yes.

No. 2. No.

No. 3. No.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

TAXATION—EXEMPTION OF NON-PROFIT INSTITUTIONS

August 4, 1930.

Mr. F. A. Hood, Secretary,
I. O. O. F. Building Company of Chadron,
Chadron, Nebraska.
Dear Sir:

In answer to your inquiry of July 17 concerning recent court decision on the exemption from taxation of such institutions as the Knights of Columbus and similar organizations, you are advised that the latest decision along this line is that in the case of Telocvicna, Jednota Sokol v. County of Douglas, Case No. 27340, decided by our Supreme Court July 3, 1930. Plaintiff organization is a branch of Sokoldka Obec V Americe (Gymnastic Union of Sokols in America.)

In an opinion by the court without reviewing the authorities or the

evidence, the court affirmed the decision of the district court of Douglas County holding the plaintiff organization exempt from general taxes. The general object of this corporation, as expressed in its by-laws is, "that of a social, educational and a gymnastic club." Its main purpose is expressed in its articles to be to "foster the mental, physical and moral development of its members and others and generally to promote the welfare of the citizens of Czecho-Slovak birth or decent and to carry out the aims and purposes of Sokoldka Obec V Americe (Gymnastic Union of Sokols in America), of which organization this corporation shall be and is a part; said corporation may also by its by-laws provide for funeral expenses of deceased members."

This decision appears contra to the prior decisions of the Supreme Court on this subject and, we believe, throws considerable doubt upon the exemption status of social and philanthropic organizations generally.

Judge Broady of the Lancaster County District Court recently held that the Masonic Building Company owning and operating the Masonic Temple in this city was not exempt from taxation as to said property. This case has been appealed to the Supreme Court.

This is a matter concerning which you should advise with local counsel.

Yours very truly,

C. A. SORENSEN, Attorney General.

GASOLINE TAX—REFUND FOR LOSS OF GASOLINE

August 13, 1930.

Hon. W. C. Oelkers,
Deputy State Treasurer,
State House,
Lincoln, Nebraska.
Dear Sir:

This is in answer to your kind letter of August 7th, 1930, in which you state and inquire:

> "Attached please find letter from Burow Brothers of Humboldt, Nebraska, requesting refund of state gas tax on loss of gasoline due to leaky underground tanks.
>
> "Will you please advise if under the present statute this department has legal authority to make refunds on losses of this nature.

The pertinent statute appears to be Laws 1929, Chapter 149, Section

4, Page 522, reading in part as follows:

> "The state treasurer shall have authority * * * to authorize refund of tax paid on motor vehicle fuel destroyed by fire or act of God."

Since this was leakage and not a fire loss, no refund is authorized because of any destruction by fire. The only remaining question is whether the leakage was caused by an "act of God."

As defined by our Supreme Court in Matousek v. Galligan, 104 Neb. 731, 733, "an act of God * * * must be an act or occurrence so extraordinary and unprecedented that human foresight could not foresee or guard against it, and the effect of which could not be prevented or avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation of the party renders it reasonable that he should employ."

Within this definition the term "act of God" is usually employed to the evidence and effects of storms, floods, earthquakes, volcanic eruptions and casualties of a similar nature, and also to certain fires. It does not appear that the leaks in this tank were caused by any of these occurrences.

Could the occurrence of the leaks in this tank be forseen and guarded against by human foresight? And, could the effect of such leaks be prevented or avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation of the owner of the tank made it reasonable that he should employ? To us, it seems that an affirmative answer is required to both of these questions.

From the time of its acquisition, this tank was in the exclusive possession, custody and control of its owner. Neither the state nor anyone else, by any acts of commission or omission, caused or contributed to the defects causing the loss of gasoline and the tax thereon. In the exercise of ordinary care for his own protection, the owner of this tank, at the time of its acquisition and installation, could and should have inspected it and its several mechanical members for defects or lesions due to internal stresses. After installation and pending service, ordinary care required the owner to inspect the tank for defects due to external stresses sustained in the carriage of its load. The rule is too well settled to require the citation of any authority that the owner or user of any machinery or mechanical apparatus, under his complete dominion and control, is liable for all losses due to defects which might have been discovered by reasonable care in inspection.

We are, therefore, of the belief that the leaks in this tank, from

which the loss of gasoline and of tax ensued, was proximately caused not by an act of God but by the negligence and want of care of the owner and user applying for the refund. Under these circumstances we are of the opinion that the state treasurer is not authorized to make the refund in question.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

COUNTY COURT—AUTHORITY TO SENTENCE TO PENITENTIARY

July 1, 1930.

Mr. N. T. Harmon,
Chief State Probation Officer,
State House,
Lincoln, ebraska.

Re: State of Nebraska
v.
Joe Ryan

Dear Mr. Harmon:

It is our opinion that a County Judge is without authority in this state to sentence anyone convicted of crime to imprisonment to the penitentiary.

In Section 9923, Compiled Statutes of Nebraska 1922, felony is defined as:

> "an offense as may be punished with death or imprisonment in the penitentiary. Any offense is denominated a 'misdemeanor.'"

The County Judge has no authority to try felonies. In such cases he can only "inquire into the complaint," Section 9979, Compiled Statutes of Nebraska 1922, as amended by Chapter 101 Laws of 1925.

When the complaint is for a misdemeanor only, "the County Judge may receive a plea of guilty and sentence accordingly," Section 9988 Compiled Statutes of Nebraska 1922 as amended by Chapter 102 Laws of 1925.

Section 9, Article 5 of the Constitution of Nebraska provides: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide; and the judges thereof may admit persons charged with felony to a plea of

guilty and pass such sentence as may be prescribed by law."

This section of the Constitution clearly places felonies in the hands of the district courts as to pleas of guilty and sentence thereon.

Child abandonment with which the defendant in this case was charged is a felony in this state. Section 9584, Compiled Statutes of Nebraska 1922. It was therefore the duty of the County Judge in this case to bind the defendant over to the district court which court alone had the power to receive the plea of guilty and to sentence the defendant to the penitentiary.

The commitment is therefore in our opinion wholly void.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

FIRE MARSHAL—POWERS AND DUTIES

August 11, 1930.

Mr. John C. Trouten,
State Fire Marshal,
Lincoln, Nebraska:
Dear Sir:

Section 12 of Chapter 183 Session Laws of 1925 which is entitled, "An Act relating to fire inspection and prevention" and provides for the repeal of certain sections of the Compiled Statutes which were heretofore in force provides among other things that:

> "The state fire marshal many condemn and by order direct the destruction, repair or alteration of any building or structure which by reason of age, dilapidated condition, defective chimneys, defective electric wiring, gas connections, heating apparatus or other defect, is especially liable to fire and which building or structure, in the judgment of said state fire marshal, is so situated as to endanger life or limb or other buildings or property in the vicinity."

You will observe that the statute only provides that such an order can be made when by reason of some defect in its repair or construction the building condemned is especially liable to fire and is so situated as to endanger life or limb or other property in the vicinity.

I doubt whether it is the intent of the law under consideration to authorize the destruction of a building merely because it is out of repair. I think it is the intent of the law that the lack of repair shall make it

peculiarly liable to fire and also that because of its location its liability to destrucion or damage by fire makes it peculiarly dangerous either to persons or to other buildings or property in its vicinity.

Sincerely yours,

C. A. SORENSEN, Attorney General.

BASIC SCIENCE LAW—APPLICATION

April 9, 1930.

Mrs. Clark Perkins, Director,
Bureau of Examining Boards,
Department of Public Welfare,
Lincoln, Nebraska.
Dear Mrs. Perkins:

Some days ago you and Dean Thompson and Secretary Pollard called on the writer to discuss certain provisions of Chapter 164, Laws of 1927, known as the "Basic Science Act", relating to examinations in the Basic Sciences. It was stated at that time that the National Board of Medical Examiners of the United States, an unofficial association of medical men and women, gives regular examinations to graduates of the various medical colleges of the country, which examinations include the Basic Sciences as defined in Section 1 of the Basic Science Act, as well as subjets relating solely to the practice of medicine and surgery. The examinations given by this National Board are recognized and accepted by the examining boards of more than forty states at the present time. Under Section 105 of Chapter 167, Laws of 1927,—the so-called general licensure law—our State Board of Examiners in Medicine and Surgery are authorized to accept the examination issued by this National Board of Medical Examiners in lieu of the examination given by the State Board to applicants for license to practice the profession of medicine and surgery.

Under Section 8 of the Basic Science Act (Chapter 164, Laws of 1927) the State Board of Examiners in the Basic Sciences is authorized in its discretion to waive the examination required by Section 7 of the Act "when proof, satisfactory to the Board is submitted, showing that the applicant has passed the examination in the Basic Sciences before a board of examiners in the basic sciences or a board authorized to issue licenses to practice the healing arts in another state, when the requirements of that state are, in the opinion of the Board, not less than those provided by this act, and if such state grants like exemption from examination in the basic sciences to persons granted certificates by the board of this state."

You ask if, in our opinion, the Board of Examiners in the Basic

Sciences is authorized to accept the examination given by the National Board of Medical Examiners in the Basic Sciences in lieu of the examination in the Basic Sriences provided for in Section 7 of the Basic Science Act, and, if not, whether the Board, by reviewing and re-grading the examination papers of applicants who have passed the examination given by the National Board, is properly carrying out the provisions of the Basic Science Act.

Whether or not the Board may lawfully accept the examination in the Basic Sciences given by the National Board depends upon the construction to be given the language of Section 8 of the Basic Science Act above quoted. If the language of this section were plain and unambiguous and capable of only one construction, no difficulty would be presented. Unfortunately, however, the language employed, as it seems to us, is capable of two different constructions; one of which, if adopted, would forbid the State Board from accepting the examinations issued by the National Board, and the other of which would permit it.

It was stated at our conference that Nebraska and perhaps half a dozen other states are the only states having a Board of Examiners in the Basic Sciences which is separate and distinct from the examining boards in the various branches of the healing arts. In the states not having a separate board of examiners in the Basic Sciences, such examinations as are given in the Basic Sciences are given by the regular Board of Examiners in each branch of the healing arts.

One construction of Section 8 above quoted, and the construction which seems to us to be the more natural, is that the Legislature, having in mind the fact that certain states had Boards of Examiners in the Basic Sciences and others did not, but had only examining boards authorized to issue licenses, intended that only examinations issued by State Boards of other states could be accepted by our State Board of Examiners in the Basic Sciences; that where the other state had a Board of Examiners in the Basic Sciences and the requirements of that state were in the opinion of the Board equal to those of Nebraska, and where that state granted exemptions from examination in the Basic Sciences to persons from Nebraska, such examination might be waived; and where the other state did not have a Board of Examiners in the Basic Sciences but its boards of examiners in the various healing arts which were authorized to issue licenses gave examinations in the Basic Sciences and those examinations were equal, in the opinion of the Board, to the requirements of Nebraska and such state grants like exemption from examination in the Basic Sciences to persons from Nebraska, then such examinations might also be accepted in lieu of the examination provided in Section 7 of the Act.

This interpretation would not permit the Board to accept the ex-

amination given by the National Board of Medical Examiners because it is neither a Board of Examiners in the Basic Sciences in another state where the requirements are equal to those of Nebraska, or which grants exemption from examination to persons from Nebraska nor is it a Board "authorized to issue licenses to practice the healing arts" in any other state.

It is true that the examinations given by the National Board are accepted in most of the states but this does not mean that the Board has official authority to grant licenses to practice in any state in the Union.

Section 8 of the Basic Science Act is, however, in our opinion, capable of another interpretation. It is possible to interpret it to mean that the State Board of Examiners in the Basic Sciences may in its discretion waive the examination required by Section 7 when proof, satisfactory to the Board, is submitted, showing that the applicant has passed the examinations in the Basic Sciences before a Board of Examiners in the Basic Sciences or a Board authorized to issue licenses to practice the healing arts in another state, etc. In other words, the view might be taken that there are two kinds of Boards whose examinations may be accepted by the State Board of Examiners in the Basic Sciences; one, any Board of Examiners in the Basic Sciences, or, two, a Board authorized to issue licenses. It might be plausibly said that the final provisions of the section regarding the requirements of the other state and its granting like exemption to applicants from Nebraska apply only to the second class of boards, i. e. to boards "authorized to issue licenses to practice the healing arts in another state."

Under this interpretation the State Board would be authorized to accept the examinations issued by the National Board of Medical Examiners because that Board does give examinations in the Basic Sciences and is, therefore, "a Board of Examiners in the Basic Sciences."

We cannot say as a matter of law that the courts would not uphold this interpretation of the statute if the Board of Examiners in the Basic Sciences concludes to adopt it, and it could properly be said in its favor that it more nearly carries out the spirit of the law than the first interpretation, but it is our opinion that the first interpretation which we have given is the safer one for the Board to adopt.

As to whether the State Board would be authorized to take the examinations in the Basic Sciences given by the Nation Board and review or re-grade them, we think this would be proper except for the provisions of Section 6 of the Basic Science Act which provides, among other things, that "the examination shall be conducted * * * in such manner that the applicant shall be known by number only until such

manuscripts are read and the proper grade determined." As we understand it, there is no way by which the State Board can re-grade the papers of an applicant who has passed the examination by the National Board without knowing in advance the name of the applicant whose papers are being examined.

Another question you have propounded is this: An applicant for a license to practice one of the healing arts in Nebraska has passed an examination in the Basic Sciences before a Board of Examiners of another state which is authorized to issue licenses to practice such healing art in that state, but such state has no Board of Examiners in the Basic Sciences. Assume that such state refuses to exempt applicants from Nebraska from taking examinations in the Basic Sciences even though they have passed the examinations in the Basic Sciences given by the Nebraska Board, as some states do, for the reason that the members of the Nebraska Board are not licensed practitioners of any of the healing arts, but assume also that such states do exempt from examination applicants who have passed both the Basic Science examinations and the examinations in their particular branch of the healing arts and are duly licensed to practice in Nebraska. Your question is: Should the Nebraska Board of Examiners in the Basic Sciences waive its examination and accept applicants from such states without examination in the Basic Sciences upon satisfactory proof that such applicants have passed examinations in the Basic Sciences before Boards of such other states authorized to issue licenses?

It is our opinion that our Board of Examiners in the Basic Sciences is not authorized under Section 8 to waive the examinations of applicants in cases such as this. Section 8 specifically says that the Board is entitled to waive the examination required by Section 7 of the Act only in cases where "such state grants like exemption in the Basic Sciences to persons granted certificates by the Board of this state." If the other state will not recognize and accept the examination given by our Board in the Basic Sciences, our Board has no authority, as it seems to us, to accept the examinations given by Boards of other states, even though such boards may accept the examinations given by our Board of Examiners in the Basic Sciences when connected with the examinations given by the Board of Examiners of the particular healing art in which the applicant seeks to be licensed to practice.

Yours very truly,

C. A. SORENSEN, Attorney General,

By HOMER L. KYLE, Assistant Attorney General.

INTER-STATE BUSSES—LICENSES

January 28, 1930.

Mr. Buck Taylor,
Department of Public Works,
State House,
Lincoln, Nebraska.
Dear Mr. Taylor:

You ask if interstate motor busses must take out a license in the State of Nebraska.

In our opinion they must. Section 8365, Compiled tSatutes of Nebraska for 1922, as amended by Chapter 159 of the Session Laws of Nebraska for 1925, and as further amended by Chapter 151 of the Session Laws of Nebraska for 1929, provides that "none of the exemptions from the requirements of registration shall apply to commercial motor trucks or motor busses."

The suit brought by Peter S. Peterson of Iowa to enjoin the Department of Public Works from compelling him to take out an automobile license on his truck applies only to commercial trucks. There is not at this time pending any suit to test the legality of the law providing that non-resident owners of motor busses must pay the same tax as resident owners.

Very truly yours,

C. A. SORENSEN, Attorney General.

CONDEMNATION—PROCEDURE—NOTICE TO MORTGAGEE

February 18, 1930

Honorable R. L. Cochran,
State Engineer,
Lincoln, Nebraska.
Dear Sir:

You say:

"A condemnation proceeding under House Rolls 340 and 341 was had in Boyd County some time ago and the allowance paid into the county's judge's office and was distributed by the county judge to the several land owners. One allowance was for $400.00 and was paid to S. W. Mosher the then record owner. At the time of the institution of the proceedings, there was a mortgage on this land and the mortgagee was not given notice of the act. The mortgage has since been foreclosed and a deficiency judgment allowed against Mr. Mosher. The mortgagee is now asking that we pay $400.00 to him.

"Will you please give us an opinion as to our liability in this and similar matters? It is our understanding that the statute makes it necessary for us to serve the owner with notice but no reference is made to the mortgagee."

The statute does not say that notice of condemnation proceedings must be given the holder of a mortgage upon the premises that are being appropriated under the power of eminent domain, but the supreme court has construed the word "owners" to include mortgage lien holders. Thus it is said "A mortgagee is an owner within the meaning of the statute providing for the taking of land under the power of eminent domain." Omaha Bridge, etc. Co. v. Reed, et al, 69 Neb. 515.

It does not follow, however, that the state owes the mortgagee anything in the instant case. In the case of Rieck v. City of Omaha, 73 Neb. 600, it was held that

"When a city by the power of eminent domain acquires a strip of mortgaged land for street purposes without making the mortgagee a party to the proceedings, and pays the condemnation money to the mortgagor, in good faith and without objection, it is discharged from its obligation, but takes the land subject to the lien of the mortgage, if of record."

The mortgagee in this case took a deficiency judgment against the mortgagor, and I am of the opinion that having foreclosed its mortgage against the balance of the tract and taken a deficiency judgment against the mortgagee for the difference between what the land sold for and the amount due it on the mortgage indebtedness, it is now estopped to foreclose its mortgage on the land condemned.

In any event it would need the consent of the legislature before it could sue the state, and I am of the opinion that it can not get such consent.

Yours very truly,

C. A. SORENSEN, Attorney General,

By GEORGE W. AYRES, Assistant Attorney General.

ANNUITIES—VALUATION FOR TAXATION PURPOSES

January 23, 1930.

Hon. Harry W. Scott,
State Tax Commissioner,
Lincoln, Nebraska.
Dear Sir:

This is in answer to your letter of January 22, 1930, requesting opinion as to how annuities should be valued for purposes of taxation.

Laws, 1929, Ch. 168 provides for the taxation of annuities at the rate of eight mills on the dollar of the actual value thereof. We fail to find any Nebraska statute or Nebraska Supreme Court decision on the determination of the actual value of an annuity. However, in our opinion the actual value of the annuity is the present worth of the contract from which the annuity is derived; said present worth to be determined by established actuarial methods.

37 Cyc. 1580, Note 65.

In re Tracy, 179 N. Y. 501, 72 N. E. 519.

People v. Trust Co., 266 Ill. 139, 107 N. E. 190.

In re White, 208 N. Y. 64, 101 N. E. 793.

Cresham v. Knight, 127 Tenn. 708, 156 S. W. 468.

The really difficult question is to determine whether a given item is an annuity. We regard the word "annuity," as used in Laws 1929, Ch. 168, as meaning "a fixed sum, granted or bequeathed, payable periodically, but not necessarily annually, subject to such limitations as to its duration as the grantor or donor may lawfully impose." (3 Corpus Juris, 200, Notes 4 to 6). We are attaching hereto a discussion by us of the status of alimony judgments as annuities. This indicates the lines of demarcation along which determination is made as to whether particular items are annuities.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

CO-OPERATIVE ELEVATOR COMPANY—STOCK—HOW ASSESSED FOR TAXATION

May 23, 1930.

Mr. Harry W. Scott,
State Tax Commissioner,
Capitol Building,
Lincoln, Nebraska.
Dear Mr. Scott:

In answer to your inquiry of May 13 as to whether a cooperative farmer elevator company should be assessed as any other Nebraska corporation, we believe the answer will be found in Sections 5935 and 5936, Compiled Statutes of Nebraska, 1922. The former section provides a method for the assessment of "a grain broker," being a person, firm or corporation "engaged in the business of buying and selling hay or grain for profit." Although such cooperatives may not strictly be

classified as corporations for profit, so far as the corporation itself is concerned its organization is based upon the ultimate object of profit to the members and, therefore, might well be construed as a grain broker within the meaning of Section 5934. In fact, under the provisions of Chapter 80, Laws of 1925, pertaining to the organization and incorporation of non-stock cooperative marketing companies and associations, the same have power "to buy and sell agricultural products including live stock, for its members and stockholders and others, and as agents on commission."

Assuming that such a cooperative association due to its particular type of organization does not come within the definition of "a grain broker", as above stated, the association must be held to be doing a warehousing business under the provisions of Section 5935, Compiled Statutes of Nebraska, 1922, and taxable accordingly. That section provides:

> "The term warehouse herein shall be construed to include all cold storage plants or houses or all places where articles of food, feed or grain is stored or kept."

We believe the intent of the legislature as to the taxation of cooperatives may be determined somewhat from the provisions of Section 14, Chapter 80, Laws of 1925, as follows:

> "The provisions of the general corporation laws of this state, and all powers and rights thereunder shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this act, and any provision of law which is in conflict with this act shall not be construed as applying to any association herein provided for."

There is no question that cooperatives as such are not exempt from taxation, the constitution clearly defining and limiting exemptions to certain types of non-profit organizations, among which cooperatives are not included.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

APPROPRIATIONS—VALIDITY—EFFECT OF VETO

August 2, 1930.

Hon. Harry W. Scott,
State Tax Commissioner,
Lincoln, Nebraska.
Dear Sir:

We are in receipt of your letter of August 1st in which you say:

"Included in the appropriation bill, House Roll 280, passed by the 1929 session of the legislature are the following items which were not in the Governor's budget:

"For the construction of a building at Bridgeport, Nebraska, to house the records and equipment of the Bureau of Irrigation $10,000

"Manual Training School Building and Landscaping of grounds (Nebraska School for Deaf, Omaha) $58,000

"For Reservoir $9,000, pump and well $3,000 at sub-station (State Penitentiary, Lincoln) $12,000

"College of Medicine, (University of Nebraska) Hospital equipment not to exceed $40,000

"Each of these items was vetoed by the Governor. Is it your opinion that these items on account of not having been in the Governor's budget would not be valid appropriations in accordance with the decision of the Supreme Court in the Elmen case "

You state that the above items were not in the Governor's budget. From your statement we assume that the provisions of the state budget law were not followed as to these items. The state budget law (Sections 7268-7282, Compiled Statutes of Nebraska for 1922) provides in substance that

"Each department, state office, and state institution, including the University of Nebraska, shall file in the office of the secretary of the department of finance on or before the fifteenth day of September in the year preceding the convening of the regular session of the legislature an itemized statement of their total estimated requirements for the next biennium for each unit of their organization and activity classified as to object of expenditure."

The law further provides that such estimates of financial requirements must be accompanied by a statement in writing "giving facts and explanations of reasons for each item of increased appropriation requested." The secretary of the department of finance then compiles the requests of the different departments and institutions into a consolidated budget which he files with the governor together with all the written explanations furnished by the different departments and agencies asking for appropriations. The governor is given power to raise, lower or reject any request for appropriation "or item therein"

and in submitting the budget to the legislature Section 7280 provides that the governor shall submit copies of a tentative bill for all the proposed appropriations of the budget clearly itemized and properly classified.

From your letter and from the information you have furnished this office, we are assuming that as to the four items mentioned in your inquiry none of them represent requests for appropriations filed, as required by law, in the office of the secretary of the department of finance, on or before the fifteenth day of September, 1928.

Section 7, of Article 4 of the state constitution reads as follows:

> "The Governor shall, at the commencement of each session, and at the close of his term of office and whenever the Legislature may require, give by message to the Legislature information of the condition of the state, and shall recommend such measures as he shall deem expedient. He shall, by message, make to the Legislature an account and statement, with vouchers attached, of all moneys received and paid out by him, from any and all funds subject to his order, and, at the commencement of each regular session shall present, by message, a complete itemized budget of the financial requirements of all departments, institutions and agencies of the state for the ensuing biennium. Said budget shall be prepared with such expert assistance and under such regulations as may be provided by law. No appropriations shall be made in excess of the recommendation contained in such budget unless by three-fifths vote of each House of the Legislature, and such excess so approved by a three-fifths vote shall not be subject to veto by the Governor."

You will note that this constitutional provision provides that the budget shall be prepared "under such regulations as may be provided by law." It would seem therefore that the four items listed in your inquiry never having become a part of the state budget in the manner provided by law, are not governed by the constitutional provision with reference to recommendations contained in the budget. Therefore the fact that these four items were approved by three-fifths vote of each house of the legislature does not mean that they were not subject to veto by the governor. All non-state budget appropriations come under the provisions of Section 15 of Article 4 of the state constitution which provides that the governor may disapprove any item or items of appropriations contained in bills passed by the legislature and the item or items so disapproved shall be stricken therefrom, unless repassed in the manner prescribed in the case of the disapproval of bills. The four items mentioned in your inquiry were vetoed by the governor and repassed by the legislature. Therefore, in our opinion the veto of the

governor as to these four items was and is effective.

The recent decision of the supreme court in the case of Elmen v. The State Board of Equalization and Assessment, casts some doubt on the proposition. The language of the opinion can be construed to mean that no appropriation for any state institution, department, or agency can be passed except by three-fifths vote of both houses of the legislature and in no case is subject to veto by the governor, regardless of whether or not the request for appropriation had been submitted to him as provided in the budget law, or whether introduced as a separate bill or inserted as a separate item in the general appropriation bill. That is the contention of Dean Foster, a representative of the University of Nebraska. But Judge Eberly in his opinion says:

> "* * * The field of controversy as between the intervenor and the respondent is narrowed to the single question: Are increases properly made in a budget bill subject to the veto of the chief executive?"

The court held that such increases were not subject to the veto of the governor, but we do not think this opinion is binding, for the reason that it appears that the increases in question were not "properly made in a budget bill."

If the contention is sound that the governor can never veto any appropriation for any state department, institution or agency, under the provisions of Section 7 of Article 4 of the state constitution, then the state budget system has been crippled beyond repair. If that is the law then there is no particular reason why any state department or institution should submit its requests for appropriation to the governor at the time and in the manner provided by the state budget law. It would not matter whether any such request was made or not, for the department or institution could have its friends introduce a bill in the legislature to appropriate such money as it wanted and the bill would not be subject to veto by the governor. In fact the governor would never have an opportunity to pass on any such request for an appropriation. If that is the meaning of the constitution, then the attorney general, for example, wihout submitting any request to the governor in the manner provided by law could have his friends in the legislature introduce a bill providing for a separate building for the state department of justice and appropriating one million dollars therefor, and if the bill passed by three-fifths vote, it would not be subject to veto by the governor.

In Weis v. Ashley, 59 Neb. 494, the supreme court of Nebraska held that the governor is a part of the law-making power of the state and exercises that power when he approves or vetoes bills.

As to requests for appropriations submitted to the department of finance on or before September 15th of the year preceding the con

vening of the regular session of the legislature, the governor has an opportunity to veto the request in advance by recommending to the legislature that the requested appropriation be not granted. In such a case the requested appropriation cannot be granted without a three-fifths vote of each house of the legislature. But where no request has been made through the department of finance for an appropriation and the governor has never had an opportunity to either recommend or disapprove of the requested appropriation, then it seems to us that any separate bill for such an appropriation is subject to the veto of the governor.

Respectfully submitted,

C. A. SORENSEN, Attorney General.

STATE BANKS—RIGHT TO SET-OFF AGAINST SPECIAL ASSESSMENTS

May 27, 1930.

Hon. Clarence G. Bliss,
Secretary, Department of Trade and Commerce,
Lincoln, Nebraska.
Dear Sir:

You have inquired of this office as to the purported action of certain state banks attemtping to set off against their regular and/or special assessments to the Depositors' Guarantee Fund, now Depositors' Final Settlement Fund, the assets in such banks representing a charge to the Bankers' Conservation Fund. Some banks have advised you of such action.

Although the matter is not altogether free from doubt, it is our opinion that such an offset cannot be made and that the Department is in no manner bound to recognize such an attempt on the part of the banks involved or their notice to that effect.

Although the law pertaining to the Bankers' Conservation Fund as originally enacted has been repealed, we believe the status of that fund as an asset in the banks interested, respectively, has been fixed by the original law pertaining thereto. We call your attention to the following provision of that law:

> "The banks may carry the amount remitted on such draft on their books as an asset, debited to the 'Bankers Conservation Fund', until such time as it may be repaid to said bank or charged off against the profits of the bank not needed for any purpose other than the payment of dividends."
>
> Sec. 25, Chapter 191, Laws of Nebraska, 1923.

This section, although now repealed, seems to have established the

status of this asset as to its ultimate disposition. This means that, if the item of Bankers' Conservation Fund turns out to be a loss, in whole or in part, such loss must be charged against profits of the bank available for dividends.

Yours very truly,
C. A. SORENSEN, Attorney General.

DRIVER'S LICENSE—POWER OF GOVERNOR TO SET ASIDE COURT ORDER REVOKING

January 29, 1930.

Honorable Arthur J. Weaver,
Governor of the State of Nebraska,
State House,
Lincoln, Nebraska.
Dear Sir:

In a recent telephone conversation you asked for an opinion from this department as to the authority of the Governor or other official to set aside an order of a court revoking the license of a person to operate a motor vehicle when such person is convicted of operating a motor vehicle while under the influence of liquor or narcotic drug.

Section 12, Chapter 148, Laws of 1929, provides that "if the conviction shall be for manslaughter resulting from the operation of a motor vehicle or for operating a motor vehicle while under the influence of liquor or narcotic drug, said license shall be revoked and a new license shall not be granted within two years from the date of conviction in the case of manslaughter, nor within one year from the date of conviction for operating a motor vehicle under the influence of liquor or narcotic drug * * *. Appeal from the sentence of conviction shall constitute an appeal from the suspension or revocation of the license."

It is our opinion that where a license has been revoked as provided in the statute above quoted, and the order revoking such license has not been appealed from, that no official or body has authority to set aside such order or restore a license so revoked within the period fixed by the act except the Board of Pardons under the authority vested in it by the constitution.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

VACANCIES IN LEGISLATURE—RIGHT OF GOVERNOR TO FILL

February 13, 1930.

Hon. Arthur J. Weaver,
Governor,
Lincoln, Nebr.
Dear Governor Weaver:

You state that you are contemplating calling a special session of the legislature and you inquire whether you have authority to fill the vacancies which have occurred in the membership of the legislature since the last general election.

Section 2246, Compiled Statutes of Nebraska for 1922 on this subject reads in part as follows:

> "When a vacancy occurs in the office of representative in congress, or members of the legislature, and the body in which such vacancy exists will convene prior to the next general election, the governor shall order a special election to fill such vacancy at the earliest practicable time, and ten days' notice of such election shall be given: PROVIDED, any vacancy occurring in either house of the legislature during a regular or special session thereof shall be filled by the governor within five days after said vacancy occurs by appointment of some qualified person of the same political affiliation as the previous incumbent from the district in which the vacancy has arisen. * * *"

The only question of interpretation is whether the state legislature "will convene prior to the next general election." It may be argued that this section relates only to the constitutional mandatory convening of the regular session which will not be prior to the next general election. In view of your announcement, however, it appears that prior to the next general election the legislature in fact "will convene." Since the validity of much important legislation enacted at this special session may depend on the validity of a few votes, we deem it the safer course to advise you to call special elections to fill the existing vacancies. The whole theory of our government is that the people shall elect the members of the law-making body and any law giving the governor the right to appoint members of the legislature must be construed strictly against such power on his part and liberally in favor of the ancient right of the people to choose their law-makers.

Ten days notice of each special election must be given. (Sec. 2246, Compiled Statutes for 1922).

The county board of canvassers must meet the third day after the special election to canvass the votes and the next day the county clerk

must transmit to the secretary of state an abstract of the votes cast if there be more than one county in the district. (Sec. 2250, Compiled Statutes for 1922). Within ten days after the special election the board of state canvassers must meet and canvass the votes to fill the vacancy. If when they meet the returns have not come in from the counties, the board may adjourn to such day as may be necessary, not exceeding five, to receive the returns. (Section 2251, Compiled Statutes for 1922).

In order to allow the statutory time for the notice of the special election to be given and time for the receiving of the returns, it would appear that in order to be safe from twenty to twenty-five days should elapse from the time of notice of special elections to the time of convening of the legislature in special session.

As to the nomination of candidates for office to be filled by special election Section 2123, Compiled Statutes for 1922 provides:

> "All nomination for candidates of any political party for office to be filled at a special election or any other office to be filled by the electors, excepted from the provisions of this article, shall be nominated by a convention or committee of their political party, which nomination shall be in writing, shall contain the name of the office for which each person was nominated, the name and residence of each person, and if in a city, the street, number of residence, and place of business, if any, and shall designate in not more than five words, the party which said convention or committee represents. It shall be signed by a presiding officer and the secretary of such convention or committee, who shall add to their signatures their respective places of business and take an oath before a qualified officer to administer the same, that the affiants were such officers at such convention or committee, and that said certificate, and the statements therein contained, are true to the best of their knowledge and belief. * * *"

This of course is not a matter concerning which you have any duty to perform. The various political parties may or may not as they choose nominate candidates. It might be well for you to notify the respective chairmen of the various political parties of your intention to call a special election in certain legislative districts, and thus give them an opportunity to take steps to have their respective parties nominate candidates.

Where the legislative district only embraces one county it would appear that the county committee of each party would have the right to nominate the candidate of their party for the office to be filled. The situation as to senatorial districts is somewhat different because so far

as I know here are no senatorial district party committees. If I were asked about the matter I would suggest that the chairman of each political party call together the county committees in the senatorial districts and have them organize as a senatorial district committee.

Very truly yours,

C. A. SORENSEN, Attorney General.

TAX—CHECK FOR ON FAILED BANK—REMEDY

January 25, 1930.

Mr. Fred E. Ericson,
State Treasurer,
State House,
Lincoln, Nebraska.
Dear Sir:

This is in answer to your letter of January 23, 1930, requesting opinion as to whether you can hold for payment of gasoline tax an oil dealer who undertook to pay the tax by a draft on a Cedar Bluffs bank which was closed when the draft was presented to it for payment.

By Section 5597, state taxes can only be paid by state warrants or lawful money of the United States. In Richards v. Hatfield, 40 Neb. 879, it was held that if a check or draft was accepted in payment of taxes and paid, the same would operate as payment. But in that case as to a check accepted but not paid, it is said: "If this check had been protested or never had been paid, of course it would not have operated as a payment of the taxes."

It is, therefore, our opinion that the dealer in question can still be held for the payment of this tax.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

UNION LABOR—RIGHT TO REQUIRE ON STATE BUILDINGS

September 25, 1930.

Hon. Harry S. Thorpe,
Board of Control,
Lincoln, Nebraska.
Dear Sir:

This is in answer to your kind letter of September 19, 1930, in which you state and inquire:

"Will you be good enough to advise us whether or not we may legally require union labor to be used in the construction of

state buildings, and may so state in our published notice to bidders."

Some phases of your question are no doubt ruled by Wright v. Hoctor, 95 Neb. 342, 145 N. W. 704. In that case, it appeared that in 1913 the city of South Omaha was operating under Laws 1909, Chapter 17, Section 128 of this law required contracts for street improvements to be let to the lowest responsible bidder. Section 123 of this law required the work under such contracts to be done by union labor. For reasons fully set out in the opinion in the Wright case and too lengthy to be set out here, the Nebraska Supreme Court held the union-labor clause to Section 123 to be unconstitutional and void. The court also held that the union labor clause restricted competition in bidding and disregarded the mandatory "lowest-responsible-bidder" clause.

The application of the Wright case to your inquiry is indicated by Section 6851, Compiled Statutes of Nebraska, 1922. This law governs the letting by your board of building construction contracts exceeding one thousand dollars. It provides that "all contracts shall be awarded to the lowest responsible bidder but the right shall be reserved to reject any and all bids." This " lowest responsible bidder" requirement in the South Omaha charter was held in the Wright case to be unconstitutionally violated by the charter's purported authorization of an express union labor clause excluding employers of non-union labor from the bidding. We are, therefore, of the opinion that in the specifications, notice to bidders, proposals, contracts or other documents and proceeding evidencing the process of contracting for the construction of buildings by your board, there can be no express union labor clause or other provision which has the effect of arbitrarily excluding from the bidding employers of non-union labor.

This opinion, of course, merely scratches the surface of the important mixed economic and legal problem suggested by your letter. This opinion leaves undecided the vital question of whether in determining the responsibility of the otherwise successful bidder, his proposed employment or non-employment of workmen, possessing the well-known or easily ascertained labor-union standards of proficiency, wages, hours of labor and conditions of work, may be considered by your board in letting the contract. Upon this precise question, we fail to find that the Nebraska Supreme Court or other courts of last resort have ever passed. Nevertheless, in the immediate vicinity of the particular law question at issue there are enough decided cases from which an acceptable answer may, in our judgment, be derived on principle.

Thus, the nature and extent of your board's power under the "lowest-responsible-bidder" clause of Section 6851 are clearly defined in State ex rel Nebraska B. & I. Co. v. Board of Commissioners, 105 Neb. 170,

181 N. W. 530. In this case, the Nebraska Supreme Court held that your board acted judicially and exercised a discretionary power in determining the responsibility of the bidder. In explaining your board's discretion in this matter, the court held that the board could not arbitrarily or capriciously adjudge a bidder "unresponsible" and reject his bid on that ground. The court said that your board must have before it evidence sufficient to show a rational and reasonable basis for its decision. The court also held that "the term 'responsible' as used in the statute is not limited in its meaning to mere financial responsibility, but includes within its purview the general ability and capacity of the bidder to perform the work, his facilities and suitability for the task, and those qualities which he must necessarily have in order that he be able to perform the contract according to its terms." In this case, the court, speaking through Flansburg, J., also said arguendo:

> "When the board has made a decision that a certain bidder is not 'responsible,' and this decision has such support from evidence, or information, then at hand, as to show that the board did not act arbitrarily, or from favoritism, ill will, or fraud, but from an honest conviction based on the facts, that its action was, in its judgment, for the best interests of the state, it is not the province of the court to interfere by mandamus and direct the action of the board, even thought the court should believe that the conclusion of the board was erroneous. For the court to take evidence and upon that evidence to determine that the bidder was in fact 'responsible' in such a case would be to substitute the opinion and judgment of the court for that which, by the statute, belongs to the board, and would, under well-recognized rules of law, be unwarranted."

This language, we submit, is tantamount to a declaration that in passing upon the "responsibility" of a bidder, the board must decide whether the acceptance of his bid is for the best interests of the state; and that with the board's decision, whether correct or erroneous, the courts will not interfere unless it is alleged and proven to be corrupt or prejudiced.

This construction of "lowest-responsible-bidder" requirements also appears to be the law in other English speaking jurisdictions (See 36 Cyc. 876, Notes 42 to 45; 15 Corpus Juris 551, Notes 31 to 34; 44 Corpus Juris 111, Note 68).

The board's discretionary power to reject as not "responsible" an otherwise successful bid, is also enlarged by general law almost beyond belief by the reservation in Section 6851 of power in the board "to reject any and all bids." In 44 Corpus Juris, Section 2210, Pages 112 and 113, it is said:

"The general rule, subject to a few qualifications, is that a reservation of a right to reject any and all bids gives the city a right to reject the lowest for a higher bid" (Note 2).

"An award to a bidder whose bid is at a higher price without readvertisement is lawful where the city has the reserved right to reject any and all bids and the statute under which the city makes its award authorizes an award to the lowest and best bidder, quality and price both to be considered in making its decision" (Note 7).

"If the reservation is contained in the statute, it will be given its full force and effect as against other restrictive provisions in the statute or charter" (Note 13).

"Where a statute contains a reservation of the right to reject, there is still a limitation on the power to reject, the city being under an obligation to exercise its discretion honestly, without fraud or collusion. But where such reservation exists, the fact that the contract was not awarded to the lowest bidder does not of itself indicate fraud." (Notes 14 and 15).

"Where the right to reject any or all bids is reserved it has been held that the city has a right to reject the lowest bid in favor of one higher, without readvertisement." (Note 95).

Further confirmation of the view that your board may consider labor-union standards of workmanship in deciding the responsibility of bidders, is furnished by the following quotation from 44 Corpus Juris, 112 Notes 83, 85 and 86, citing New York, etc. Gas Coal Co. v. Pittsburg, 6 Pa. Dist. 757; Hammonton v. Elvins (N. J. Sup.) 127 A. 241; Loughheim v. Philadelphia, 15 Pa. Dist. 311; People v. Buffalo, 176 N. Y. S. 642:

"The word 'responsible', as used in the statutes, applies * * * not * * * to any possible failure by him (bidder) to perform the contract where the only causes suggested for the possible failure are wholly within the control of the labor leaders objecting to the award * * * although it has been held that the city authorities may take such matters into consideration and base their award thereon where the specifications take them into account, or where a right to reject any and all bids is reserved."

The application and pursuit of these principles will perhaps, more often than not, result in building contracts with employers of union labor even when their bids are not the lowest. Under Section 6851 it is certainly the duty of your board in letting contracts for building construction to get not only the best materials but also the best work-

manship for the best price. In this endeavor the board certainly can gather evidence or other information as to standards of quality in workmanship, including the differences, if any, between union and non-union or "scab" labor. If, in thus preparing to let contracts for building construction, the board finds that union wages, hours, apprenticeship and conditions of labor generally make the best quality of workmanship, no reason suggests itself why your board cannot incorporate that quality of workmanship into the specifications and notify the bidders to make their proposals or bids accordingly.

This, of course, is not advising that, without having evidence or information pertinent to the bidders on each job, the board can take judicial notice or conclusively presume that the employers of union labor have superior facilities and are more responsible than the employers of "scab" labor. It was settled in Wright v. Hoctor, supra, that employers of non-union labor could not be expressly and in terms excluded from the competition.

But, if in looking into the responsibility of the bidders on each job as it comes along, the board finds that the low bidder's "facilities" for giving the specified quality of workmanship are not as good as a higher bidder's "facilities"—whether because of employment of "scab" labor or for any other reason—the board is clearly authorized to reject the bid of the low bidder because he is not, in the legal sense, "responsible." No one will seriously dispute that floating, underpaid, overworked, improperly trained or non-apprenticed workmen, even if cheaper, may prove in the end to be the most irresponsible, the most expensive and the most detrimental to "the best interests of the state" which it is the duty of the board in letting building contracts to secure. It is the unescapable legal duty of the board honestly to determine by investigation and evidence, if necessary, what is the best kind of workmanship and to enforce compliance therewith by the successful bidder.

We are, therefore, of the opinion that, while your board cannot directly or indirectly exclude from the competition for building construction contracts employers of non-union labor, it can enforce standards of quality in workmanship for the performance of which only employers of union labor may in many cases be found "responsible."

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General, and
C. L. REIN, Assistant Attorney General.

RAILWAY COMMISSION—RIGHT TO REGULATE POWER RATES

January 17, 1930.

Hon. C. A. Randall,
Nebraska State Railway Commission,
Office.
Dear Sir:

In response to the questions submitted by Hon. James Auten, in connection with the proposed franchise for a lighting plant at North Bend, Nebraska, which is a city of the second class, I have this to say:

Q. Has the Railway Commission authority to regulate light and power rates in cities of the second class?

The Railway Commission has no power to regulate such rates.

Q. May a maximum rate, specified in the franchise granting a power company authority to own and operate an electric light plant for the purpose of furnishing electricity to a city and to its inhabitants, be raised during the life of such franchise, which will be for twenty-five years?

If the ordinance granting the franchise is properly drawn and accepted by the power company, it becomes a binding contract and the rates cannot be changed by either party during the period.

See Sec. 4188, Comp. Stat. of Nebr. 1922.

City of University Place v. Lincoln G. & L. Co., 109 Neb. 370.

Nebraska G. & E. Co. v. City of Stromsburg, 2 Fed. (2nd) 518.

It may be that the Legislature may, in the future, provide for the fixing of rates notwithstanding the contract. A definite statement can hardly be made concerning such legislative action as the courts are not in agreement on the subject.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HUGH LAMASTER, Assistant Attorney General.

EMINENT DOMAIN—RIGHT OF FOREIGN CORPORATION TO EXERCISE POWER OF—PIPE LINE

October 7th, 1930.

Hon. Chas. A. Randall, Chairman,
Nebraska State Railway Commission,
State Capitol Building,
Lincoln, Nebraska.
Dear Sir:

Several times recently the following question has been asked, some

of the inquiries coming through the State Railway Commission, and some of them coming directly to this department:

> "Can a foreign corporation, not domesticated in Nebraska, engaged in furnishing natural gas, lawfully exercise the power of eminent domain to secure rights of way for its pipe lines?"
> It is the opinion of this department that it cannot.

The question has been asked so frequently, and the matter involved is of such importance that we feel that the reasons for this conclusion should be fully set forth.

Section 635, Compiled Statutes of Nebraska for 1922, defines a foreign corporation thus:

> "'Foreign corporations' as the terms are used in the next preceding section shall embrace and include all corporations organized under the laws of any foreign government, of any other state than the State of Nebraska, and of any territory thereof, including the District of Columbia."

The policy of this state, respecting the power of a foreign corporation to hold real estate, is disclosed by Sections 5687 and 5690, Comp. Stat. 1922. Section 5687 is, in part, as follows:

> "Aliens and corporations not incorporated under the laws of the State of Nebraska are hereby prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years or any other greater interest less than fee in any land, or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided, except that the widow and heirs of aliens who have prior to March 16, 1889, acquired lands in this state under the laws thereof, may hold such lands by devise, or descent for a period of ten years and no longer, and if at the end of such time herein limited, such lands, so acquired, have not been sold to a bona fide purchaser for value such lands or other interest therein shall revert and escheat to the State of Nebraska; * * *"

Section 5690 is as follows:

> "This article shall not, nor shall anything in the statutes of Nebraska, prevent the holders, whether aliens or corporations not organized under the laws of the State of Nebraska, of aliens upon real estate or any interest therein, whether heretofore or hereafter acquired from holding or taking valid title to the real estate subject to such liens, nor shall it prevent any such alien or corporation from enforcing any

lien or judgment for any debt or liability now existing, or which may hereafter be created, nor from becoming a purchaser at any sale made for the purpose of collecting or enforcing the collection of such debt or judgment: provided, however, all lands so acquired shall be sold within ten years after the title thereto shall be perfected in such alien or foreign corporation, and in default of such sale within such time, such real estate shall revert and escheat to the State of Nebraska, as provided in this article: provided, further, the provisions of this article shall not apply to the real estate necessary for the construction and operation of railroads; and Provided, further, nothing in this article shall be construed to prohibit any alien or foreign corporation from purchasing and acquiring title to so much real estate as shall be necessary for the purpose of erecting and maintaining manufacturing establishments; and Provided, further, the provisions of this article shall not apply to any real estate lying within the corporate limits of cities and towns; and provided, further, that the provisions of this article shall not apply to any real estate acquired by any alien prior to the passage and taking effect of this act, as long as such real property shall remain the property of such alien."

These statutory provisions in substantially their present form superseded earlier enactments in the year 1889. The amendments since that date have not substantially changed them, so far as they relate to the present discussion.

Section 641, Comp. Stat. 1922, should be referred to, as it affords explanation of some of the seeming differences in the authorities. It reads as follows:

"Foreign corporations shall have the right to receive, take, purchase and hold by mortgage or otherwise, any securities and liens executed, given or transferred or so intended to represent or secure loans upon or purchase-money of lands or other property situate or being in this state, and to sell, assign, transfer, and to sue upon, foreclose or otherwise enforce the same heretofore or hereafter acquired."

Section 479, Comp. Stat. 1922, provides the method of domestication of foreign corporations. It reads as follows:

"Any corporation organized under the laws of any other state or states, territory or territories, which has filed, or may hereafter file with the secretary of state of this state, a true copy of its charter or articles of association, shall, on filing with the secretary of state a certified copy of a resolution adopted

by its board of directors, accepting the provisions of this article, be and become a body corporate of this state."

It will be seen from the foregoing statutory provisions that the public policy of this state is to restrict the ownership of real estate by foreign corporations to narrow limits. The constitution is silent on the subject, except as to the power of railroad companies to condemn lands. A railroad company, not organized as a domestic corporation and not domesticated, may not exercise the right of eminent domain, nor acquire real estate in this state. Section 8, Article X, of the Constitution, is as follows:

> "No railroad corporation organized under the laws of any other state, or of the United States and doing business in this state shall be entitled to exercise the right of eminent domain or have power to acquire the right-of-way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state."

That section was also found in the Constitution of 1875. At that time pipe lines were not in use in this part of the United States. There were then no common carriers requiring rights of way in this state, except railroads and telegraph lines. There were no canals for transportation purposes. There were a few canals, but they were used in connection with water power plants, or possibly in connection with some small irrigation projects.

No Federal question is perceived in connection with this subject. Section 1 of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 1) is, in part, as follows:

> "The provisions of this Act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas by pipe line, or partly by pipe line and partly by railroad, or by water; * * *"

The Constitutional provision relating to railroads, above quoted, has been before the Supreme Court a number of times. In State v. Scott, 22 Neb. 628, the court was asked to issue a writ of mandamus requiring a commissioner of public lands and buildings and the governor to prepare and sign, respectively, a deed for certain real estate to the relator,

the Burlington & Missouri River Railroad Company, a foreign corporation. A demurrer to the petition was sustained and the writ was denied. In the opinion the court said:

> "The undeviating rule adopted by this court is, not to discuss the constitutionality of a statute unless the question fairly arises in the case, and in no case heretofore presented to this court has the right of a foreign corporation doing business in this state to condemn right of way or to acquire real estate or other uses been presented. It is apparent, however, that such foreign corporation possesses no such rights. Our laws are liberal in promoting the organization of railroad companies and the construction of railways in the state. But such corporations must be under our own laws—the creature of our statutes and not of the laws of other states. It will be observed that in each application for the condemnation of the lots above described the C., B. & Q. and the L. & N. W. R. R. Co. are joined as relators. That the C., B. & Q., being a foreign corporation, is debarred from the right to the relief prayed for was conceded by one of the attorneys for that corporation on the argument. That matter may, therefore, be dismissed; but can it take as lessee of the L. & N. W. R. R.? The constitution declares that it shall not acquire right of way or real estate for depot or other uses. If it cannot acquire these, it cannot take by lease or other means. It cannot do by indirection what it is absolutely prohibited from doing directly. To be entitled to relief it must organize under the laws of the state."

Trester v. The Missouri Pacific Railroad Company, 23 Neb. 242, involved the power of a nonresident railroad corporation to acquire real estate for right of way purposes. The court said:

> "If defendant desired to exercise the right of eminent domain, it could do it in one way only, and that would be by becoming 'a body corporate pursuant to and in accordance with the laws of this state.' Failing to do so it is without the ability to call into action that 'due process of law' necessary to deprive a citizen of his property, and is powerless to take any steps in that direction. The principle of estoppel contended for by plaintiff in error can have no application. No rights can be acquired by it by user, and nothing which it has done by way of filing the request can give it the ability to take or acquire the right of way."

Koenig v. C. B. &. Q. R. R. Co., 27 Neb. 699, involved the power of a foreign railroad corporation to exercise the right of eminent domain.

In the opinion, the court said:

> "This question was very fully considered in State v. Scott, 22 Neb. 628-9, and it was held that a foreign corporation is prohibited from acquiring right of way or real estate for depot or other uses, and that it cannot do indirectly what the constitution prohibits it from doing directly. In other words, that, as it cannot perform any of the acts named, therefore it cannot avail itself of the services of another corporation to accomplish this result. The denial to a foreign railroad corporation of the right of eminent domain, and the power to acquire right of way or real estate for depot or other uses, is an absolute prohibition against such corporation either owning or holding a railroad in this state. The denial of the right to acquire right of way is very broad and comprehensive, and its meaning unmistakable. 'No foreign corporation can exercise the right of eminent domain or (can) acquire right of way,' etc. If it cannot acquire, then it is forbidden to hold what it is prohibited from acquiring, because the effect of the denial of the right of acquisition is to prevent it from taking property. And as it cannot do indirectly what it is prohibited from doing directly, it cannot acquire and hold a leased line and thus evade a plain constitutional prohibition. These provisions were placed in the constitution not as a measure of hostility to railroads, but to protect the citizens of the state in the enforcement of the rights, and prevent corporate abuses. Therefore a foreign corporation, to own or operate a line of railway in this state, must become a corporation under the laws of the state in some of the modes pointed out in the statute. * * *"

In State v. C. B. & Q. R. R. Co., 25 Neb. 156, it appeared that the Chicago, Burlington & Quincy Railroad Company, a corporation of Illinois and of Iowa, had consolidated with the Burlington & Missouri River Railroad Company, a Nebraska corporation, by merging the stock of the respective companies into one joint stock company to be known as the Chicago, Burlington & Quincy Railroad Company. It was held that by virtue of such consolidation and compliance with Sec. 114, Chap. 16, Comp. Stat. of 1887, the corporation created thereby became a body corporate in accordance with the laws of this state, and was therefore not a foreign corporation.

The same effect was given a consolidation in the case of Trester v. Missouri Pacific Railroad Company, 33 Neb. 171, and in Rogers v. Cosgrave, 98 Neb. 608.

In Gould v. Board of Home Missions, 102 Neb. 526, the court considered a devise of certain real estate in Nebraska, subject to a life

estate, to a foreign corporation "to be appropriated and applied for the use and benefit of the Women's Board of Home Missions of the Presbyterian Church in the United States of America." It was held that the words quoted above denoted a charitable trust or use for a religious purpose, and that the trustee named was a foreign corporation and could not take the trust estate. It was further held that as a valid charitable trust was created, it would not be permitted to fail because the trustee was incompetent to take title of the real estate, but that a trustee would be appointed by the court. In its discussion of the subject, the court said:

> "Agnes v. Gould, deceased, devised to the defendant, a foreign corporation, subject to a life estate in her daughter, the plaintiff, the real estate in controversy, 'to be appropriated and applied for the use and benefit of the Woman's Board of Home Missions of the Presbyterian Church in the United States of America.' A demurrer to plaintiff's petition was overruled, the will was declared void, and judgment quieting title in plaintiff, heir at law, was entered, from which defendant appeals.
>
> "Section 6273, Rev. St. 1913, provides: 'Nonresident aliens and corporations not incorporated under the laws of the state of Nebraska are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase or otherwise.
>
> "Under this prohibition of the statute, intended as a part of the public policy of the state, touching land, it is unlawful for the trustee named to take, and hence unlawful for the testator to give to it, the land in controversy. Some cases are cited interpreting statutes limiting the amount of real estate which corporations may acquire, holding that such statutes are regulatory merely of the corporation and can be invoked only by the state. These cases do not apply. This statute is prohibitory. If the language above quoted, together with the sections following, do not forbid and prevent foreign corporations from taking or holding Nebraska land, as against anybody, it would be difficult for a legislature to find words that would accomplish in full a purpose which, in some form or other, has possessed every people which has occupied a territory as its own."

Attention is called to Lord v. Schultz, 115 Neb. 33, which might, at first sight, seem to be, in part, inconsistent with the holding in Gould v. Board of Home Missions. In Lord v. Schultz, which involved a question as to whether or not a good and merchantable title had been tendered, it appeared that the plaintiff's grantor was a foreign corporation, and had taken over the land in question in settlement of a mortgage obligation then due to it. The settlement also included certain land

not described in the mortgage. As to the land covered by the mortgage, there seemed to be no doubt that the title conveyed by the mortgagor to the mortgagee was covered by the exceptions in Section 5690, Comp. Stat. 1922, as quoted above, and by the provisions of Section 641, Comp. Stat. 1922, also quoted above. Further, it appeared that the mortgagor, the grantor to the foreign corporation, had also quitclaimed all his rights in and to the lands to the plaintiff in the case. (It seems that the quitclaim covered the entire tract, although it is not quite clear from the opinion). There was never any attempt to enforce an escheat by the state.

It must be concluded from the statutes above quoted, and the cases cited, that the public policy of this state forbids foreign corporations not domesticated to hold real estate. We now come to the consideration of the statute under which the pipe line companies seek to exercise the power of eminent domain. Section 5081, Comp. Stat. 1922, is as follows:

> "Any company, corporation or association, formed or created for the purpose of transporting, transmitting or conveying crude oil, petroleum or the products thereof, or gases, from one point in the state of Nebraska to another point in the state of Nebraska for a consideration are hereby declared to be common carriers; and any such company, corporation, or association desiring or requiring a right-of-way or right-of-ways for the laying and maintaining of any pipe line or lines for such purpose within the State of Nebraska, and being unable to agree with the owner or lessee of any land, lot, real estate, or right-of-way on the amount of compensation for the use and occupancy of so much of any lot, land, real estate or right-of-way as may reasonably be necessary for the laying, relaying and maintenance of any such pipe line shall have the right to acquire the same for such purpose, as hereinafter provided. Such company, corporation or association is hereby placed under the control and subject to regulation by the state railway commission of the state of Nebraska, and subject to Article X of chapter 67, of the revised statutes of Nebraska for the year 1913 (Art. X, ch. 59) so far as the provisions thereof are applicable to pipe lines as common carriers."

The first question for determination is whether or not foreign corporations are included in the language of Section 5081, supra.

Certain general principles of law relating to eminent domain should be kept in mind, namely: Eminent domain is an attribute of sovereignty; a sovereign power will only be conveyed by an express grant; the right to exercise the power must be based on constitutional provisions or

legislative enactments; there can be no taking of private property for public use against the will of the owner without authority under the constitution or under legislative act; the right of eminent domain is not granted as a matter of interstate comity; the legislature, unless restrained by constitutional inhibitions, may grant the right to an individual, to an association or to a corporation, either foreign or domestic.

With these general rules before us, and with the general public policy of this state with regard to the holding of real estate by foreign corporations in mind, it would seem clear that as foreign corporations are not specifically mentioned in the statute, they are not included within its purview. This appears especially clear when it is considered that the statute attempts to affect the sovereign power of the state. It is a general rule that sovereignty is not affected by an enactment, unless specifically mentioned. Therefore, it seems clear, on principle, that foreign corporations are not included within the language of the statute. Such is the holding of a number of authorities.

Lewis on Eminent Domain, Third Edition, Section 374, states the law thus:

> "Strictly speaking, the legislature cannot delegate the power of eminent domain. It cannot divest itself of sovereign powers. But, in exercising the power, it can select such agencies as it pleases, and confer upon them the right to take private property subject only to the limitations contained in the constitution. Accordingly it has been held that the right may be conferred upon corporations, public or private, upon individuals, upon foreign corporations, or a consolidated company composed in part of a foreign corporation, and upon the federal government. Such has been the common practice since the Revolution, and the right to do so has never been a matter of serious question; and it may be regarded as settled law that, in the absence of special constitutional restriction, it is solely for the legislature to judge what persons, corporations or other agencies may properly be clothed with this power.
>
> "The general grant of the power of eminent domain to all corporations of a certain class or organized for certain purposes, is held not to include foreign corporations. This is in accordance with the rule of strict construction universally applied to such statutes, and also in accordance with the rule that statutes are presumed to refer and apply only to persons and things within the State enacting them. * * *"

Chestates Pyrites Co. v. Cavendar's Creek G. M. Co. (Ga.) 46 S. E. 422; Helena Power Transmission Co. v. Spratt, (Mont.) 88 Pac. 773, 8 L. R. A. (N. S.) 567; Duke v. Postal Telegraph Cable Co. (S. C.) 50 S.

E. 675; Evansville Traction Co. v. Henderson Bridge Co., 141 Fed. 51; Illinois State Trust Co. v. St. Louis, I. M. & S. Ry. Co., (Ill.) 70 N. E. Rep. 357. In the last case cited above, the court said:

> "The power of eminent domain is an incident to sovereignty and inherent in the state, and can be exercised only on the occasion, in the mode, and by the agency prescribed by the Legislature. No other state can authorize the exercise of that power within this state, and the laws under which petitioner has its existence could not and do not purport to do so. The petitioner can have no legal existence in this state outside of the boundaries of the state where it was incorporated, and can exercise none of the powers conferred by its charter except by consent of the Legislature of this state. It is competent for the Legislature to delegate the exercise of the power of eminent domain to a foreign corporation (authorities), but the power can only be exercised when so granted. The power to take the property of the individual without his consent is against common right, and all acts authorizing such a taking are to be strictly construed (authorities). Unless both the letter and the spirit of the statute relied upon clearly confer the power, it cannot be exercised."

In Ruling Case Law, Vol. 10, title "Eminent Domain," Sec. 168, the law is stated as follows:

> "A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication, and when the power is granted, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained. * * *"
>
> See Spratt v. Helena Power Transmission Co. (Mont.) 8 L. R. A. 567.

There are numerous cases holding that where a general term such as "any person", or "any person or corporation", or "any and all corporations" is used in a statute, it includes foreign corporations. 20 C. J., p. 543, title "Eminent Domain", sec. 28. Such authorities appear less convincing than those that hold that general terms, such as those used above, do not include foreign corporations.

As pointed out above, the fixed policy of this state prohibits foreign corporations from holding real estate. It appears impossible that the legislature had in mind the abrogation of such policy, and yet made no direct declaration in regard to it.

This leads to the second question: Did section 5081 repeal the several statutes prohibiting foreign corporations from holding real estate?

There was no direct appeal. The fixed policy of this state concerning the ownership of real estate by foreign corporations, the rule that implied repeals are not favored, the rule that the vesting of a sovereign power must be clear and explicit, all strongly indicate that there was no repeal. Again, it is a settled rule of statutory construction that an act, the provisions of which are general, will not, unless unavoidable, be interpreted to affect more particular and positive provisions of a prior act on the same subject. State v. Hay, 45 Neb. 321; Dawson v. Clark, 58 Neb. 756. In the last case, the following language appears:

> " 'The rule is that repeals by implication are not favored, and when acts upon the same subject can be harmonized by a fair and liberal construction, it will be done. (Authorities) And this rule has especial application to cases where the subsequent statute treats of the subject in general terms but not expressly contradicting the more particular and positive provisions with reference to the same subject in a prior act. (Authorities) In State v. Dwyer, 42 N. J. Law 327, the court says: "Where a general law and a special statute come in conflict, the general law yields to the special without regard to priority of date, and a special law will not be repealed by a general statute, unless by express words or necessary implication." Applying these rules of construction to the statutory provisions in question it is possible to give effect to each.' In the light of the doctrine recognized and applied in that case there is no escaping the conclusion that the said act of 1867 was not repealed by implication by the adoption of section 69, article 1, chapter 14, Compiled Statutes, inasmuch as there is no conflict between the two statutes, but the provisions thereof can, and should be, so construed as to give effect to each and all of them."

Colton v. Sampson, 81 Neb. 30; Plank v. Swift (Iowa) 8 A. L. R. 309 and note; Levy v. Fidelity L. & T. (Ky.) 11 A. L. R. 207 and note. The conclusion is that there is no repeal.

For these reasons, it is the conclusion of this department that a foreign corporation, not domesticated in Nebraska, engaged in furnishing natural gas, cannot lawfully exercise the power of eminent domain to secure rights of way for its pipe lines.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HUGH LAMASTER, Assistant Attorney General.

TAXATION—REAL ESTATE MORTGAGES ON LAND IN OTHER STATES

December 10, 1930.

Mr. Farley Young,
Deputy County Attorney,
Lincoln, Nebraska.
Dear Sir:

You submit to this department for answer a question submitted to you by the county assessor which has to do with the assessment of $16,000 secured by mortgage on Michigan real estate and belonging to the estate of the late ....., who was a resident of Lancaster County, Nebraska, at the time of his death. It appears that it is contended this asset of the estate is not taxable in this state because of a condition contained in the mortgage that the indebtedness which it secures shall be paid in Michigan, and that all payments, taxes and assessments of every kind shall be paid by the mortgagor. I do not agree with this contention.

In my opinion the notes which belonged to one who was a resident of this state at the time of his death are taxable here even though they are secured by a mortgage on Michigan real estate and are taxable under the term of the mortgage in that state and are payable under the terms of the mortgage by the mortgagor.

A mortgagee can not by contract with a party in another state bar this state from collecting tax upon personal property owned by him here so long as he is a resident of this state.

It is conceivable that his personal representatives may have a right of action against the mortgagor for taxes they are required to pay upon the mortgage indebtedness here, but that does not bar this state from collecting the tax in my opinion.

Thus it is said:

> "An agreement by one holding a leasehold or other interest in property but to whom it would not be assessable, to assume and pay the taxes thereon, may be binding as between the parties to it but does not affect the right of the state to proceed against the party assessed."—37 Cyc. 770.

It occurs to me that by a parity of reason it should be held that the state is not barred from collecting the taxes in dispute in the instant case.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

TAXATION—EXEMPTIONS—CHURCH PROPERTY

December 10, 1930.

Hon. T. M. Scott,
County Judge,
Aurora, Nebraska.
Dear Sir:

You ask our opinion as to whether a Presbyterian parsonage which is being rented for $20.00 per month, the proceeds going to the Federated Presbyterian and Congregational churches of Aurora, is taxable property.

In our opinion such property is taxable.

Section 5821, Compiled Statutes for 1922 exempts from taxes property owned and used exclusively for religious purposes when such property is not owned or used for financial gain or profit to either the owner or user. It has been held by our Supreme Court that this statute must be strictly construed, Y. M. C. A. v. Douglas County, 60 Neb. 642, 83 N. W. 924, and that the use to which the property is put is the criterion by which to determine whether or not it is exempt from taxation, Y. M. C. A. v. Lancaster County, 106 Neb. 105, 182 N. W. 593.

It has frequently been held by our Supreme Court that where property belonging to a religious, charitable or educational association is leased or rented to outside parties for uses neither religious, charitable or educational, that such property is not exempt from taxation even though the proceeds of the lease or rent are devoted to religious, charitable or educational purposes. First Christian Church v. Beatrice, 39 Neb. 432, 58 N. W. 166; Y. M. C. A. v. Douglas County, 60 Neb. 642, 83 N. W. 924, 52 L. R. A. 123; In re House of the Good Shepherd, 113 Neb. 489, 189 N. W. 981.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

FOOD—GIFT PACKAGES

July 17, 1929.

Mr. R. D. Wilson, Manager,
Farmers Co-operative Company,
Bloomfield, Nebraska.
Dear Sir:

This is in answer to your kind letter of July 6, 1929, requesting information as to whether one may deal in packages of food, such as oat meal and pop-corn, with premiums contained in the package.

In this state, it is contrary to law to sell misbranded articles, which include food products, if there be contained in the package any gifts, premium or prizes or articles other than food purported to be contained whether or not declared by label (Sections 7429, 7434 and 7436, Compiled Statutes of Nebraska, 1922). All premiums should be given separately from the package.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

FISHING—SPEARING

July 29, 1929.

Mr. Richard E. Hopkins,
Bellwood, Nebraska.
Dear Sir:

We have your letter of the 25th in which you ask if it is against the law to spear carp, buffalo fish and other coarse fish not classified as game fish.

The law does not specifically forbid the spearing of such fish. The old law did, however, expressly permit the spearing of these fish, but such law was repealed. This leaves the question somewhat in doubt as to whether the Legislature still intended to permit the spearing of such fish.

The new law, however, authorizes the State Game Commission to issue licenses for hunting and fishing and to make rules and regulations for the enforcement of the game law. The Game Commission has adopted a rule forbidding the spearing of any fish whether game fish or coarse fish, or the taking of any such fish in any manner except by hook and line.

Until a court has said that the Commission has no authority to make such rule, it would appear to be unlawful to spear carp or other fish.

Yours very truly,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

CREAM BUYERS—ANTI-DISCRIMINATION LAWS RELATING TO

July 24, 1929.

Mr. Leonard A. Flansburg,
Attorney for Fairmont Creamery Co.,
1404 Sharp Building,
Lincoln, Nebraska.
Dear Sir:

We have had under advisement now for some time your request for an interpretation of the anti-discrimination laws insofar as they affect the creamery companies operating in Nebraska. We have had the benefit of your memorandum brief and several conferences with the attorneys for the various old line and cooperative companies interested. The subject matter is exceedingly complicated and it is not with any cock-sureness that we state our conclusions. We have given the subject matter a great deal of study.

In our opinion:

1. A creamery company may pay any price for cream it sees fit, provided that taking into account transportation charges the net general price paid per pound is uniform throughout the state except where variation in such net price is necessary to meet bona fide local competition.

2. Such variation by a creamery company in its uniform state-wide price to meet local competition must not be more than enough to meet the local price.

3. The practice of collecting a service charge does not in and of itself constitute a violation of the anti-discrimination statutes if maintained throughout the state on the same basis. However, the fact that a service charge is collected must be called attention to in the posting of the price paid for cream.

4. The practice of some creamery companies of offering to their patrons their choice of two prices: One, a flat rate per pound with no service charge; the other, a higher rate per pound but with a deduction of a 31 cent service charge for each cream delivery, violates the anti-discrimination statutes unless an offer of choice between two prices with the same margin or differential between them is made by such creameries throughout the state at all their buying points.

5. In localities where cooperative companies pay patronage dividends to their stockholders the practice of some of the large old line creameries paying a bonus to their former patrons

equal to such patronage dividends cannot be justified as meeting competition and is in violation of the anti-discrimination laws if not paid also to all of their patrons in the state.

6. **A bona fide independent buyer who buys cream only at one point in Nebraska is not subject to the anti-discrimination laws of the state but nevertheless must comply with the laws against unfair trade practices.**

The reasoning that has lead us to these conclusions is briefly as follows:

The purpose of our anti-discrimination law relating to purchase of cream (Chap. 11, Laws 1929) is, we believe, accurately stated by Mr. Justice McReynolds of the U. S. Supreme Court in discussing a similar Minnesota statute in the case of Fairmont Creamery Co. v. State of Minnesota, 274 U. S. 1, 47 S. Ct. 506. Justice McReynolds said:

> "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction."

In the Fairmont Creamery Company case, supra, it was held that the statute in question violated the Fourteenth Amendment of the federal constitution because it did undertake to fix a uniform price for cream on the basis of a single transaction and did not permit the cream buyer to adjust his price in different localities to meet competition. This objection, we think, has been met in our law by the provision permitting a buyer to pay a price equal to that of a bona fide competitor in any locality without regard to the regular price.

The method by which our law proposes to prevent strong buyers from destroying competition by paying excessive prices is to require such buyers to pay a uniform price throughout the state except where variation is necessary to meet bona fide local competition. It is necessary, if the purpose of the statute is to be effected, that this uniform or standard price be a definite and certain price per pound, or other unit of cream or butter fat. The buyer is at liberty to fix any standard price he sees fit, but he must pay the same price or rate throughout the state, taking into account only the difference in cost of transportation to the place of manufacture or sale and the variation in price made necessary by local competition.

The first question we consider is: Does the practice of making a 31 cent service charge for each delivery of cream constitute a violation of the statute? In our opinion it does not.

The contention of those who maintain that it does violate the statute is that it actually results in giving to the patron who makes a big delivery a greater price per pound than is received by the patron making a small delivery. For example; assuming the price is 42 cents per pound less 31 cents service charge, the patron who delivers 30 pounds of butter fat will receive $12.60 less 31 cents or $12.29, which is 40 29/30 cents per pound whereas the patron who delivers only 10 pounds will receive $4.20 less 31 cents service charge or $3.89, which is only 38 9/10 cents per pound, or a difference of more than two cents per pound in favor of the patron making the larger delivery. It will be noted, however, that while the actual amount received per pound in the two cases is different, the rate of pay is exactly the same in each case. It is probably safe to assume that the cost to the buyer of handling each delivery of cream is about the same regardless of the amount delivered. There seems to be nothing in the law forbidding the buyer to charge for this service if he makes the same charge to each patron even though it results in the small patron getting less per pound for his cream. If the two transactions were kept separate as they might very well be so that the patron as he made his delivery handed 31 cents to the agent for the service of handling the delivery, it would hardly be contended that because the buyer paid the big patrons 42 that the 31 cents service charge is a reasonable charge for services actually rendered there appears to be no legal reason why the buyer should not make this charge to each patron regardless of the fact that cents for his cream it must pay the little patrons 44 cents. Assuming it is a relatively greater burden on the small patron than on the large. Even if it could properly be called discrimination, however, it is not such discrimination as is prohibited by the statute. The statute forbids only discrimination in price between one place or locality and another; not between patrons of the same locality or station.

We now consider the practice sometimes adopted of offering to the patron his choice of two prices: One, a flat rate per pound with no service charge deducted, the other, a higher rate per pound but with a deduction of the 31 cent service charge per each delivery. As already stated, we understand the law to require that each buyer fix a standard price per pound to be paid uniformly over the state except where a different price may be required to meet local competition. Where a service charge is deducted it is permissible to pay a somewhat higher price than this standard price, the difference being designed to absorb the service charge so that the patron will on the average receive approximately the standard price per pound for his cream.

For example, if the standard price fixed by the buyer is 40 cents per pound and it appears that the levying of a 31 cent service charge per delivery would be an assessment on the average of two cents per

pound on all cream delivered to the buyer, the buyer might offer to pay 42 cents per pound at stations where he deducted a 31-cent service charge, or 40 cents per pound at stations where he deducted no service charge. The point is that the price paid at stations where a service charge is deducted must have a definite fixed relation to the standard price and this relationship, or the differential in prices between service charge price and the standard price, must be determined by discovering the cost per pound of handling all cream delivered to the buyer. If the cost of handling cream is 2 cents per pound then an increase of 2 cents over the standard price may be paid at stations where a service charge is deducted, but the price may not be arbitrarily increased three or four or five cents. It must at all times be based on and determined by the standard price.

Assuming that the standard price is 40 cents per pound and that where a 31 cent service charge is deducted a price of 42 cents per pound would be proper, is it lawful for this buyer to offer to his patrons at the same buying station the choice of either price?

The answer to this question must depend on whether or not such practice constitutes a discrimination in price between that locality and others throughout the state. We believe that ordinarily the practice would constitute a discrimination in price between localities and would be unlawful. Suppose that the towns A, B and C are all within the same trade territory in Nebraska and that the cream company has a buying station in each town. In town A the buyer pays a straight 40 cents per pound for butter fat without deducting a service charge. In town B the buyer pays 42 cents per pound minus a 31 cent service charge on each delivery. At town C the buyer pays both prices, offering the patron his choice of either price. What is the effect of this practice on the three towns? It is natural that the small patrons (those delivering 15 pounds or less) will prefer the 40 cent flat rate. The large patrons whose deliveries amount to more than 15 pounds will prefer to take the 42 cent rate less the 31 cent service charge. The result is that small patrons of town A where the 40 cent flat rate is paid will remain at A while the large patrons will go to C. At station B where 42 cents less service charge is paid, the large patrons will remain but the small patrons will go to C where they can get the 40 cent flat rate. Thus C station will be drawing the large patrons away from station A and the small patrons away from station B to the injury of both stations. This we think is unfair discrimination between localities.

The reason is that where both prices are offered at the same station we no longer have a single standard price. The buyer is in effect drawing a sharp line between the small patrons and the large patrons so that the small patron is receiving a straight price of 40 cents per

pound for his butter fat while the large patron is being paid a price of 40 cents plus for this product. Assuming that the average amount of the deliveries above 15 pounds would be 31 pounds, the practice of offering a double price would result in paying the small patron 40 cents a pound and the large patron 41 cents a pound. The small patrons would be segregated from the large patrons and a separate standard price would be maintained for each. By separating the small patrons from the large the buyer is preventing them from equalizing each other and is thereby setting up one standard price for the small patron and a distinct and higher standard price for the large patron. This when it effects a discrimination in price between localities is we think forbidden by the anti-discrimination law.

It will be contended that in the illustration used above if we assume that there is an independent buyer in town C who is paying 40 cents flat per pound, the company with stations at A B and C would have a right to pay 42 cents less service charge in C because that is the standard price and also 40 cents flat to meet the competition of the independent buyer. This contention rests on the fallacy of assuming that 42 cents less service charge is the standard price. It is not. 40 cents is the standard price and the two cents is merely added because it has been found to be the amount necessary to take care of the service charge. If we accept 42 cents less service charge as a standard price we then have two standard prices, one for large patrons, a lesser one for small patrons. By offering two prices at the same station the buyer discriminates in price between the large patrons of one locality and the small patrons of another.

The buyer always has the right to offer whatever price his competitor in the same locality is offering, but he cannot offer that price and another price in addition thereto under the theory that the other price is his standard price. If his standard price is more than his competitor is paying he may offer it, or if his competitor is paying a higher price than his standard price he may offer the same price as his competitor, but he cannot skim off the cream of the business for himself and destroy his competitor by offering both prices. In other words, he must always maintain a standard, uniform price of so much per pound for butter fat regardless of whether it is delivered in quantities of one, ten or fifty pounds per delivery. He is not permitted to maintain one standard price for small deliveries and a higher standard price for large deliveries when it will cause a variance in prices paid in different sections and localities. This proposition goes to the very heart of the purpose of the statute. The practical effect of offering a double price at points where competition exists would be to stifle and destroy the competition of less powerful buyers.

Regarding the practice of paying a bonus in addition to the regular

price paid said to be followed by certain centralizer companies in localities where cooperative companies pay patronage dividends to their stockholders, we believe such practice is a mere subterfuge and constitutes a violation of the laws against unfair competition. It amounts to a mere gift or addition to the regular price which when held out as an inducement to patrons to patronize such company constitutes an offer to pay more than the uniform standard price. It cannot be justified on the ground that it is meeting the competition of the cooperative companies because such dividends paid by cooperative companies to their patrons are in no sense a part of the price paid for the cream but rather the profit obtained from the business which under the law relating to cooperative companies must be divided among the members on the basis of patronage just as the profits of an ordinary private corporation are divided among the stockholders. It may be that a cooperative company has from the nature of its organization an economic advantage over its rivals in the cream business, but if so it is an advantage which the law grants it and the effect of such advantage may not be neutralized by unlawful methods.

Respectfully submitted,

C. A. SORENSEN, Attorney General,
HOMER L. KYLE, Assistant Attorney General.

AUTOMOBILES—REGISTRATION—STORAGE

July 2, 1929.

Mr. Frank Trohaska,
Plattsmouth, Nebr.
Dear Sir:

Under date of May 20 we wrote you in answer to your request for our opinion regarding payment of automobile license fees for past years during which you had not used your car. In our former letter we gave it as our opinion that while the County Treasurer could not withhold your 1929 license until the license fees for all prior years had been paid, he could nevertheless collect such unpaid license fees by a civil suit against you.

We wish at this time to call your attention to the fact that the 1929 Legislature has amended the law in this respect so that the automobile owner is relieved from paying license fees for former years by filing an affidavit with the County Treasurer showing when, where and for how long his automobile was stored and that it was not in use in this state.

The new law is an amendment to Section 8379, Compiled Statutes for 1922 found in Chapter 143, Session Laws of 1929, and is as follows:

"* * * upon application to register any motor vehicle, no registration fee shall be required to be paid thereon for any previous year during which such motor vehicle was not at any time used or driven on any public highway within this state, and the person desiring to register such motor vehicle without payment of fees for previous years shall file with the county treasurer his affidavit showing where, when and for how long such motor vehicle was stored, and that the same was not in use in this state during such year or years, and upon receipt thereof the county treasurer shall issue registration certificate."

This law goes into effect July 25, 1929.

Very truly yours,

C. A. SORENSEN, Attorney General.

CO-OPERATIVE COMPANIES—PATRONAGE DIVIDENDS

July 1, 1930.

Mr. Phil Sheldon,
Care Farm Bureau Federation,
18 West 17th Street,
Scottsbluff, Nebraska.

Dear Sir:

You ask if a patronage dividend paid by a cooperative cheese company or oil company would give a commercial concern a legal right to reduce the price of their product in the case of oil or raise the price in the case of butterfat.

It is our opinion that where the cooperative company pays patronage dividends only to its members or stockholders that the dividend must be treated as profits of the business and not a part of the price, and that other competitors are not permitted to pay dividends to their patrons under the pretense of meeting the competition of the cooperative company. Where the cooperative company pays dividends to all its patrons regardless of whether they are stockholders or not a much closer case is presented and we would not undertake to say that a court would not hold that competing companies might not meet such dividend payments

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

AUTOMOBILES—REGISTRATION—RESIDENCES—BUSINESS LOCATION

January 8, 1930.

Hon. O. D. Stevens,
Police Judge,
Arapahoe, Nebraska.

Dear Sir:

You ask our opinion as to construction of statutes pertaining to automobile registration and especially as to county in which registration is required in the case of a person residing in one county and transacting business in different counties. The provisions of Chapter 144, Laws 1929, making it a misdemeanor for anyone to apply for or take out "motor vehicle registration in any county other than that in which such person actually resides or conducts a bona fide business" seem to extend to the owner the option of registration either in the county of his residence or in the county where he conducts a bona fide business. There seems to be no such optional provision in the registration section which is Section 8365, Compiled Statutes of Nebraska, 1922, as last amended by Chapter 151, Laws 1929. This section provides that the owner shall make application for registration "on a blank to be furnished for that purpose by the county treasurer of the county of (in?) which the owner resides."

Construing these provisions as in pari materia and giving full effect to the provision of the penal section it would seem that the owner's option to register either in the county of his residence or where he conducts a bona fide business should be recognized. We would say that the conduct of a bona fide business would mean more than simply traveling through the county as a salesman; and that a fixed office, headquarters or other business establishment within the county would be required in order to authorize registration in that county by a resident of another county.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

AUTOMOBILES—DRIVERS LICENSE—DRIVING EXPERIENCE

November 6, 1930.

Mrs. N. A. Lewin,
Arcadia, Nebraska.

Dear Mrs. Lewin:

The legislature did not seem to remember that in order for a per-

son to be able to drive he would have to learn to drive. As the law now is it provides that no one may obtain a license to drive a car unless he or she is sixteen years of age and can drive, and no one may drive without a license.

If the matter came into court my opinion is that if there was proof that the person accused of driving without a license was merely trying to learn to drive under the supervision of a good driver, that there would be no conviction.

Sincerely yours,

C. A. SORENSEN, Attorney General.

BANKS—DEPOSITS—SCHOOL MONEY—TRUST FUND

January 14, 1930.

Mr. Fred W. Babka, Examiner,
American State Bank,
York, Nebraska.
Dear Sir:

In answer to your letter of inquiry of the 6th instant in which you state that you understand that school district funds if deposited in the name of the school district in a state bank are preferred claims, I will say that I know of no law which in express terms authorizes the deposit of school money in a bank. I am of the opinion, therefore, that such a deposit is a trust fund. The general rule is that

> "Where public funds are wrongfully deposited in a bank which has knowledge of the character of the funds, they are impressed with a trust, and if such funds can be traced into the hands of the receiver of the bank, or if the assets in his hands have been increased by such deposits, such assets will be subject to such trust and the claim therefor will be entitled to a preference out of the assets. The question whether the ability thus to trace or identify the funds is a condition of the right to a preference in favor of trust funds is, of course, practically the same whether the trust arises from the unauthorized deposit of public or of private funds."—3 R. C. L. p. 555.

In the case of State v. Midland State Bank et al, reported in 52 Neb. at page 1 thereof, the Supreme Court of this state held that

> "A banker by receiving on deposit from a school district treasurer funds known to be held by the latter in his official capacity becomes thereby a trustee for the beneficial owner with respect to such funds, and the same may, upon his insolv-

ency, be recovered by the owner as a preferred claim against his estate."

Chapter 38, Session Laws of 1929, provides, however, among other things, for the reorganization of state banks that have been taken over by the Department of Trade and Commerce by means of agreements entered into between depositors representing at last eighty-five per cent of the deposits and the reorganizers, and it expressly provides that

"Any county, city, village, township or school district, through its governing board, and the state through the governor may enter such agreement."

I am of the opinion, therefore, that a school district will be held to such an agreement if it is signed by the school board. It is possible that the school district will be held to the terms of the agreement even though it is not signed by the school board, if no mention of its deposit is made in the agreement entered into between the depositors and the reorganizers, but as that question is not free from doubt it is best to have the matter definitely covered by the agreement.

Very truly yours,

C. A. SORENSEN, Attorney General.
By GEORGE W. AYRES, Assistant Attorney General.

BANKS—DEPOSITS—COUNTY FUNDS—"SERVICE CHARGE"

February 18, 1930.

Mr. Peter Soderquist,
Chairman County Board,
Chappell, Nebraska.
Dear Sir:

You say:

"The banks in this County felt that they could not handle the County money and put up bonds for the deposit, and still pay the 2% interest on the average daily deposit.

"The banks therefore are paying the interest as heretofore to the County Treasurer and the County Commissioners in turn, are paying the banks by warrant, out of the General fund for 2% service charge to offset the interest."

And you ask:

"Are the County Commissioners laying themselves liable by paying this 2% service charge, in order to keep the money in the County, thereby working, as they feel, for the best interest of the County."

In answer to the question you ask, I will say that in my opinion the membes of the county board do not render themselves personally liable by the allowance of these claims so long as they act for what they deem to be the best interests of the county and receive no financial benefit themselves from such action.

I will add that I do not believe the law authorizes the allowance of said claims, and am of the opinion their allowance will be defeated if some tax payer of the county carries the matter by appeal to the district court.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

BANKS—INSURANCE POLICIES ASSIGNED TO, AS COLLATERAL—LIQUIDATION OF SUCH COLLATERAL

October 14, 1929.

Mr. Edgar Ferneau,
Attorney-at-Law,
Auburn, Nebraska.
Dear Sir:

In answer to your inquiry of October 2, 1929 concerning the status of policies of life insurance assigned to the Nemaha County Bank as collateral security to loans made by that bank which is now in receivership we are giving you our opinion on the following inquiries to wit:

First, as to the validity of the assignments, it is our opinion that such assignments, if made according to the provision of the policy are valid and binding upon all parties interested.

Second, as to the effect of the assignment where both the insured and the beneficiary sign the same, it is our opinion that in the absence of provisions in the policy to the contrary, the insured and beneficiary are irrevocably bound with the effect as hereinafter stated.

Third, as to the effect of the assignment where the insured owes the bank more than the cash surrender value of the policy, it is our opinion that this makes the case all the stronger and that the assignment operates to all intents and purposes as an absolute transfer.

Fourth, you inquire what you should do in the event the insured and beneficiary refuses to sign and consent to the policy being surrendered for its cash surrender value. It is our opinion that, in the absence of provisions in the policy to the contrary, the insured and beneficiary have no legal right to refuse to sign and that the matter

is out of their hands, subject only perhaps to a reasonable notice from the receiver that he is surrendering the policy for its cash surrender value.

Fifth, you inquire whether a suit should be brought making the insurance company, the beneficiary and the insured parties. It is our opinion that if suit is necessary the beneficiary and insured are proper but not necessary parties although it would probably be better in each case to make them parties.

Sixth, you inquire whether you should pursue the policy of serving a notice that you hold the policies as collateral giving the insured or beneficiary an opportunity to redeem and in the event that they failed to do so, to cash the policy for its cash surrender value. It is our opinion that in the absence in the provisions of the policy to the contrary, the receiver has the right, especially where the loan exceeds the cash surrender value, to surrender the policy for its cash surrender value without notice to the insured or the beneficiary; however, we believe that it is a better policy to notify the insured and beneficiary that the policy will be surrendered if the loan is not paid or the cash surrender value of the policy is not paid on or before a certain date. In the absence of provisions to the contrary in the policy and where the policy provides that the beneficiary may be changed at the option of the insured, no notice to or consent of the beneficiary is necessary.

Seventh, you inquire, what is the effect of an assignment where it recites that it is assigned as the interest of the bank may appear? We are of the opinion that this wording has little legal effect upon the assignment being in a form often used by insurance companies, indicating that the assignment is for collateral purposes. The rights of the bank and receivers are substantially the same in our opinion whether the assignment is in absolute terms or in the form you mentioned.

Eighth, you desire an opinion as to the effect of the assignment where the policy is made payable to the executor, administrator or assigns of the insured. This wording simply strengthens the legal effect of the assignment when made but has little effect in our opinion upon the substantial rights of the parties interested so long as the assignment is made in conformity to the terms of the policy. This form of provision in a policy of life insurance is used where the insurance is payable to the estate of the deceased as contrasted to payment to a designated beneficiary.

Ninth, you request an opinion as to the effect of an assignment where it is made payable to a designated beneficiary either the wife or sister of the insured. Section 7897, Compiled Statutes of Nebraska for 1922, makes specific provision that

"Any person holding a policy in any such company may, without the consent of the beneficiary, unless the appointment of such beneficiary be irrevocable, either sell and surrender the same to the company, or pledge or assign the same as security for a debt, which if due the company, shall be secured by said policy whether it is in the possession of the company or not; or, with the consent of the company, he may change his beneficiary."

This statute therefore must be read into the insurance contract and will govern over any conflicting provision therein except a provision making the appointment of the beneficiary irrevocable. Therefore, once the assignment has been regularly made, the insured and beneficiary alike cannot vitiate or annul its effect by any subsequent act or refusal to act.

Naturally, since we are dealing with express contract, evidenced by the insurance policy itself, the terms of the policy must in each case be closely studied in the light of our statute and court decisions before the rights of the several interested parties can be definitely ascertained. It is therefore difficult without having in mind the express provisions of the policy to accurately pass upon the phases upon which you ask our opinion.

We are attaching hereto a memorandum of authorities which should be of some assistance.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

BANKS—DEPOSITS OF COUNTY FUNDS—SECURITY FURNISHED BY BANK

February 4, 1929.

Mr. Julius D. Cronin,
County Attorney,
O'Neill, Nebraska.
Dear Mr. Cronin:

You inquire whether in my opinion a county will have first lien upon securities deposited with its clerk or in some bank by a State Bank to secure a deposit of county funds in that bank in case the bank in which the funds are deposited should fail. The correct answer to your qustion is not free from all possible doubt.

I am of the opinion however, that in such a case the county will be given a first lien upon securities so deposited to secure the repayment of county funds in the failed bank.

In making this statement I am not unmindful of the fact that the Supreme Court of Kentucky in the case of Commercial Banking and Trust Co. v. Citizens' Trust and Guaranty Co., 156 S. W. 160, the Supreme Court of North Dakota in the case of Divide County v. Baird, 212 N. W. 256, and the Supreme Court of Minnesota in the case of Farmers and Merchants State Bank v. Consolidated School District, 219 N. W. 163 have all held under circumstances somewhat similar that the hypothecation by a bank, of securities to secure a deposit of public money, did not give a first lien on the securities so deposited. In the latter case it appears however, that the securities hypothecated were bills receivable and not government bonds or the bonds of some municipal corporation.

The law of Minnesota, made no provision for hypothecating of such assets as security for a deposit of funds and the Supreme Court of Minnesota said in that case "Where such an unauthorized pledge is made and the bank becomes insolvent, the receiver may recover the assets pledged or damages if they have been converted. That is because the pledge must be considered as in fraud of the rights of creditors of the bank."

In this state the law specifically provides that "any bank making application to become a depository under the provisions of this article may deposit with the county clerk, United States Government bonds, bonds of the State of Nebraska or of any state whose bonds are purchased by the board of Educational Lands and Funds of this state for investment of the permanent school fund, or warrants of the State of Nebraska, also county bonds, municipal bonds or school district bonds of any county, city, village or school district in the state of Nebraska issued under the direction of and with the approval of the auditor of public accounts, or securities issued under the authority of the Federal Farm Loan Act, or warrants of the county or any city, village or school district in the county."

It is true that another provision of statute says in express terms that no state bank shall be required to give security for a deposit of public money but I do not regard this as saying that if such security is given it shall be void.

In the case of State v. State Bank of Gering et al, 206 N. W. 758 the Supreme Court of Nebraska held that a surety company which had signed as surety the bond of a state bank for a deposit of county money in the bank in excess of 50 per cent of the capital stock of the bank could recover from the guaranty fund the amount it had been compelled to pay as such surety.

This, I take it, was equivalent to a holding that the contract of

suretyship made in that case was not invalid.

By a parity of reason it should be held that a contract by which securities of a kind approved by the law are hypothecated to secure a deposit of county funds in a bank, is not invalid even though the bank in which the deposit is made is a state bank, and though the law does not require that security shall be given for such a deposit.

In the case of Andrew v. Odebolt Savings Bank, 214 N. W. 559, the Supreme Court of Iowa held that a "transfer by bank of portion of its assets in good faith to county or other depositor in payment of or as additional security for deposits of public funds was valid."

The rule of law in the absence of any statutory provision to the contrary is that:

"General banking powers carry with them the implied authority to borrow money, in the absence of any restriction by statute or by charter. So authority to receive deposits is by necessary implication authority to receive money as a loan and to assign or to mortgage negotiable instruments."

"The right to borrow money carries with it the power to secure such indebtedness by mortgage or otherwise." 7 C. J. 592.

I do not find in this state any statutory provision that in express terms forbids the securing of deposits in state banks by security other than the Bank Guaranty Fund. On the contrary there is an implication that the taking of other security is permissible.

Section 14 of Chapter 30, Session Laws of 1925 provides that "Wherever the law provides for the assessment of banks on the basis of the average daily deposits, the deposits which are otherwise secured shall not be included in arriving at such average amount."

Very truly yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

BANKS—REORGANIZATION

June 12, 1929.

Mr. Frank H. Stubbs,
County Attorney,
Superior, Nebr.
Dear Sir:

In answer to your letter of the 7th instant in re validity of House Roll No. 249, passed at the last session of the legislature with an emerg-

ency clause, I will say that it is the opinion of this office that said act is valid, at least as to most of its provisions. This would be true even if it be conceded for the sake of argument that the second paragraph of Section 16 of the act to which you refer is invalid for an inspection of the act will disclose, I think, that it was not an inducement to the passage of the other provisions of the act.

I do not wish to be understood, however, as conceding that the second paragraph of Section 16 of the act is invalid. It is true that Section 7 of Article XII of the Constitution of Nebraska provides that "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held, for all its liabilities accruing while he remains such stockholder," and that any agreement entered into that involves a substantial violation of this provision of the Constitution will be invalid at least to that extent.

It is conceivable, however, that the agreements entered into may not violate that provision of the Constitution. There will be no contention of course that the above quoted provision of the Constitution is violated in so far as the eighty-five per cent or more who voluntarily enter into the agreement are concerned. The question will arise only as to the fifteen per cent or less who are not parties to the agreement.

This department has had some of the agreements for a proposed reroganization of a failed bank submitted to it for inspection by the Secretary of the Department of Trade and Commerce, and it has advised that official in some instances that it was of the opinion that he would be justified in approving the proposed plan of reorganization. In each such case the proposed plan provided for the surrender and cancellation of all the original stock and for its replacement by an equal amount of new capital.

This provision is common to all the proposed plans of reorganization that have been submitted to this office for examination. They vary as to other details, but in each instance it has seemed to us from the showing made that the plan of reorganization proposed, if carred out, will be beneficial rather than injurious to all the depositors and other unsecured creditors of the failed bank. If any one of the fifteen per cent or less who have not signed the agreement thinks otherwise and decides to test the validity of the agreement as to him by an action in court, that, of course, is his privilege.

I will add that I am informed the Supreme Court of South Dakota has recently held that a similar provision to the one under discussion was valid in that state upon the ground that it was a proper exercise of

the police power of the state. I have not seen a copy of the opinion and hence can not vouch for the correctness of the report.

I will add further that in some instances it has been suggetsed that depositors become stockholders in the reorganized bank.

Upon that proposition this department has held that although the law does provide that any county, city, village, township or school district that has money deposited in a failed bank may enter into such agreement, this does not authorize any such subdivision of the state to become a stockholder in the bank as reorganized, for Section 1 of Article XI of the Constitution provides that: "No city, county, town, precinct, municipally, or other subdivision of the state, shall ever become a subscriber to the capital stock, or owner of such stock, or any portion or interest therein of any railroad, or private corporation, or association."

Very truly yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

BANKS—DEPOSITS OF PUBLIC FUNDS IN FORM OF CHECKS, DRAFTS, ETC.—LIABILITY OF BANKS

October 21, 1929.

Mr. E. H. Luikart,
Vice-President,
Lincoln Nat'l Bank & Trust Co.,
Lincoln, Nebraska.
Dear Sir:

You make inquiry of us as to some method which may be employed by banks in this state receiving deposits of public monies to protect themselves against loss as to items (checks, drafts, etc.) deposited by the county treasurer or state treasurer where such items prove uncollectable. You refer especially to the decision of the Nebraska Supreme Court in Shambaugh v. City Bank of Elm Creek (July 1929) 226 N. W. 460.

The court in that case reviewed the statutes of this state pertaining to the deposits of public monies by county treasurers in banks of this state, holding that the sole authority of the county treasurer for deposit of public monies in banks is to be found in Sections 4694, 6191, 6196, Compiled Statutes of Nebraska for 1922, the following excerpts from these sections were quoted and construed by the court:

"It shall be the duty of the county treasurer to receive all money belonging to the county, from whatsoever source derived, and all other money which is by law directed to be paid to him.

All money received by him for the use of the county shall be paid out by him only on the warrants issued by the county board according to law, except where special provision for the payment thereof is or shall be otherwise made by law."

Section 4964.

"* * * The removal of the county treasurer or by his consent of such money or a part thereof out of the vault of the treasurer's department or any legal depository of the same, except for the payment of warrants legally drawn or for the purpose of depositing the same in the banks selected as depositories under the provisions of this article shall be deemed a felony."

Section 6194.

The court referred to the requirement of the depository bank "to give bonds for" such deposits and provided that "no treasurer shall be liable on his bond for money on deposit in bank under and by direction of the proper legal authority if the bank has given bond."

The court's conclusion is that "the county treasurer is strictly enjoined to keep public funds in his possession either in the vaults of his office or in a legal depository;" that the provisions of our laws "definitely contemplate that the deposits thus made with the official depository shall be in the form of general deposits;" and that it is beyond the power of the county treasurer and the depository bank "to circumvent the public policy evidenced by the provisions of the depository act" by an agreement to the effect that collection items making up a part of the deposit might be charged back to the treasurer's account if uncollected. In other words the court holds, if we construe its decision properly, that every "deposit" as such, by a county treasurer or state treasurer means a deposit of money without any reservation or modification. In order to meet this situation and to facilitate, as much as possible the handling of the so-called "collection items" by both treasurers and depository banks, we suggest that such items be not "deposited" in the usual manner heretofore practiced but that the transaction, as between the treasurer and the depository bank, as to such collection items become simply an arrangement providing for the collection of such items in the regular manner and according to accepted banking practice. We suggest that separate slips be used, as to such items, evidencing simply the bank's receipt of such items in some such form as follows:

.....Bank, ...Nebraska

(Date)

RECEIPT FOR COLLECTION ITEMS

Receive from....., county treasurer of.....county, Nebraska, the following collection items which this bank agrees to use due diligence to collect, and to deposit the proceeds of such collection to the credit of said county treasurer when, as and if received by this bank.

(Signature or stamp of bank).

The treasurer's deposit book should show only items actually credited to his account as a depositor. Details of crediting the collection items when paid, on the treasurer's deposit book may be worked out to the satisfaction of the parties.

Very truly yours,

C. A. SORENSEN, Attorney General,
By L. ROSS NEWKIRK, Assistant Attorney General.

(Note: This situation was modified by Special Session of Legislature in 1930, House Roll No. 17, § 1. See 77-2506, Comp. St. Neb., 1929).

CITIES AND VILLAGES—INVESTMENT OF FUNDS

May 20, 1930.

Mr. A. O. Skochdople,
Ravenna, Nebraska.
Dear Sir:

You say the city of Ravenna has created a sinking fund to take up its twenty year intersection paving bonds which contain no option for payment at an earlier date and you inquire:

> "Is it permissable for me as city treasurer to purchase these bonds on the market with this sinking fund, this sinkfund is created in our tax levy."

You also inquire:

> "Would it be out of line for me to use some of our other permanent funds, that is the more permanent, to buy our intersection bonds."

My answer to your first question is yes, if you can get them at not above par. Of course the city will be really paying off its bonds in such a case out of the sinking fund provided for that purpose.

In answer to your second question I will say that I know of no law which in terms authorizes you to invest other funds of the city in intersection paving bonds. I would look upon such an investment as safe,

however, and am of the opinion that it will be all right as a business proposition if you can get the intersection bonds at not above par.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

CENSUS—CHANGE IN POPULATION—EFFECT ON PUBLIC OFFICES

June 26, 1930.

Mr. E. D. Beech,
County Attorney,
Pierce, Nebraska.
Dear Sir:

In your letter of the 18th you submit the following questions for our opinion:

"1. What is the means by which to determine the population of a county on which county salaries are based, and in the determination thereof, what weight shall be given to the Federal census?

"2. If the present population of Pierce County, Nebraska, necessitates a change in the salaries of certain officers of that county, does that change take effect immediately, January 1st, 1931, or at the end of the terms of the present incumbent?"

We shall attempt to answer these questions in the order stated.

1. Our Supreme Court has often held, as you have no doubt noted from the cases cited by you, that the population of a county or other governmental subdivision is to be determined, like any other fact, by the best competent evidence that can be adduced, and that the United States census reports may be used as evidence, but while of great weight are not conclusive evidence as to the population. The weight to be given the federal census reports is for the court to determine just as the weight of any other evidence is determined, and there is nothing to prevent the court or other fact-finding body from discarding the census reports entirely if it is placed in possession of other competent evidence which seems to it to be more convincing. But, of course, there is a very strong presumption hard to overcome that the United States census reports are substantially correct.

For the purpose of determining the salaries of county officers we think the county board is the proper body to determine the population of the county in the first instance, subject to the right of review in the courts.

As to the means by which the population of the county is to be determined or the evidence which may be considered in determining the fact, we would say that there is no limit to the evidence which may be considered except the fundamental rules that the evidence must be competent, material and relevant to the issue. The county board might conduct a census of its own or it might resort to a dozen other methods of determining the population. In **O'Connell v. Sioux County,** 94 Neb. 826, 144 N. W. 779, the Supreme Court mentions some of the methods which had been adopted to determine the population including that based on the number of votes cast at a general election and that based on the number of children of school age. The court remarks that the statute makes no provision as to the method of ascertaining the number of inhabitants, and, under the holding in Gordon v. Lowry, 116 Neb. 359, 217 N. W. 610, any attempt of the legislature to compel the courts to accept the results of any particular method as conclusive would probably be held to be unconstitutional.

2. Answering your second question, it is our opinion that whenever the fact is established to the satisfaction of the county board that a change in the population has occurred which requires a change in the salary of any county officer, the county board may raise or lower, as the case may be, the salary of such officer immediately, without waiting for the expiration of his term of office, 46 C. J. 1024, Sec. 260. The change in salary automatically occurs with the change of population.

It is true that Article III, Section 19 of the Constitution of Nebraska forbids the legislature from increasing or diminishing the compensation of a public officer during his term of office, but where the legislature has already fixed the salary of an officer in such maner that it depends on the population of the county in which he serves, we think the salary of the officer must change with the change of population and that such change in salary during the term does not constitute an increase or diminution of compensation during the term **by act of the legislature,** which is the thing forbidden by the constitution.

Should any taxpayer of the county be dissatisfied with the action of the county board he would doubtless be entitled to review its proceedings by appropriate action in the courts.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

VILLAGES—GENERAL FUND, USE OF FOR LIGHT AND WATER

January 3, 1930.

Mr. C. I. Narragon,
Mason City, Nebraska.
Dear Sir:

This is in answer to your letter of January 1, 1930, requesting information as to whether a village may make expenditures for its water and light system out of the general fund.

We find no reference in the statutes to the "general fund" of a village except Section 4280 which provides that villages may levy a twenty-five mill tax for general revenue purposes which would include the expense of doing anything the village is authorized to do. Laws, 1925, Ch. 41 and Section 4396 authorize villages to establish and maintain water and light systems respectively. Finding no statutes prohibiting the application of the general fund to water may be made from the general fund, if appropriated as provided by Sections 4371 to 4374, inclusive, Compiled Statutes of Nebraska, 1922, whether the special Light and Water Fund is overdrawn or not.

Sincerely yours.

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

CITIES AND VILLAGES—ELECTRIC LIGHT PLANTS—INTERCONNECTION—PLEDGE OF REVENUES TO PAY COST

February 19, 1930.

Mr. F. R. Kingsley,
Minden, Nebraska.
Dear Sir:

You ask our opinion as to the legality of a proposed plan that the city of Minden enter into a contract with the village of Axtell to furnish and sell to said village electricity for light and power from the Minden plant, the village to construct the connecting transmission lines and the delivery of the electricity to be made through a meter at the Minden city limits; and the village to finance the project by pledging the income received by the village from sale of electricity to the customers of the lines thus constructed and maintained. You also suggest a possible additional service to farmers who may "hook on" to the transmission lines.

In the Sargent case you refer to (Carr v. Fenstermacher, 228 N. W. 114) the principal question before the court was whether or not a city

of the second class, which is authorized "to purchase, construct, maintain and improve lighting systems for the use of the municipality and the inhabitants thereof" (Sec. 4396, Compiled Statutes of Nebraska, 1922), is confined to the financing of such system or plant by the issuance of bonds and the levy of taxes. The city council of Sargent had by ordinance authorized the purchase of an engine and certain other equipment for the improvement of the municipal light plant, the same to be paid for out of certain cash funds on hand but mostly out of net receipts from the operation of the plant and not out of any funds raised by taxation.

Section 4397, Compiled Statutes of Nebraska, 1922, immediately followning the section above quoted from, reads as follows:

> "The cost of such utilities may be defrayed by the levy of a tax of not to exceed five mills on the dollar valuation in any one year, for a heating or lighting plant, * * *, or, when such tax is insufficient for the purpose, by the issuance of bonds of the municipality."

The following excerpt from the court's opinion in the Sargent case, Carr v. Fenstermacher, supra, is, we believe, most pertinent in its applicability to the situation presented in your letter. The court said:

> "Plaintiffs argued that the statutory methods of raising funds by means of taxation or by a bond issue excluded every other method, and that consequently the ordinance, the contract of purchase and the conditional warrants were void. The charter of Sargent shows that the two methods indicated were authorized by statute, Comp. St. 1922, Secs. 4397-9. The statutory procedure must of course be followed where the specific methods of raising money are adopted. It is shown by the record that no attempt to raise funds by taxation or by a bond issue was contemplated or made. Both methods were specifically rejected by ordinance contract and conditional warrant. It does not necessarily follow, however, that power to raise money to pay for the utility or the improvement thereof by any other means was excluded by the legislative grant. The legislation does not contain exclusive terms. A grant of power to a city may imply a means of exercising it in addition to specific statutory methods without restriction as to others. In direct language cities of the class to which Sargent belongs are specifically empowered in a single section of the charter 'to purchase, construct, maintain and improve' a lighting system. Comp. St. 1922, Sec. 4396. The section next following provides that the cost of such a utility 'may' be defrayed by means of a tax levy and, if insufficient for the purpose, by a bond issue. The word 'may', in the

sense used, does not necessarily mean 'shall'. If the city has on hand sufficient available money for that purpose, resort to a tax levy or to a bond issue is unnecessary. Christensen v. City of Fremont, 45 Neb. 160. On precedent the power to raise funds for a lighting plant by the methods mentioned in the statute is not exclusive. Contracts beyond the power of a municipality are such as it cannot lawfully enter into for any purpose. Stickel Lumber Co. v. City of Kearney, 103 Neb. 636. In the present instance the city of Sargent had $3,000 available for the initial payment. Under the contract payment of the remainder of the purchase price, $12,435, cannot be enforced by means of a bond issue or a tax levy. The seller of the new equipment and the holders of conditional warrants are limited to collection of deferred payments out of net earnings of the plant. By the very terms of the contract of sale individual property owned by residents of Sargent cannot be taxed to pay any part of the purchase price. The evidence shows that the new equipment was needed to make the plant efficient. There is nothing in the record to show extravagance, fraud or official corruption in the municipal proceedings. Performance of the contract according to its terms will not result in the taxation of any property owned by plaintiffs. The city had power in some form to make the purchase. The method adopted was not specifically prohibited by law and does not seem to be illegal. The power to pay for or improve a lighting utility with available money on hand or with net earnings of the plant is implied by the general grant. A general liability of the city was not created. Under the circumstances, therefore, want of power and alleged illegality in the respect indicated are not sufficient grounds for granting an injunction."

The authority in the city of Minden and of the village of Axtell to enter into such a contract as suggested is found in Section 4317, Compiled Statutes of Nebraska, 1922, as follows:

"Cities second class and villages—sale of light, heat or water-bonds. Any city of the second class or village is hereby authorized and empowered to enter into a contract for the furnishing of electricity, power, steam or other product of any system or plant, owned and operated by such city of village to any person or corporation, if the furnishing of such electricity, power, steam, or other product shall not interfere with the proper purposes for which the lighting, heating, waterworks or other plant of such city or village was intended. Any city of the second class or village is hereby authorized and empowered to enter into a contract with any person or corporation either within or

without the corporate limits of such city or village for the furnishing of electricity, power, steam, or other product to such city or village or to any electric, power, steam, or other system or plant owned and operated by such city or village. Such city of the second class or village is hereby authorized and empowered for the purpose of carrying out the provisions of this act, to have a right of way for and to maintain transmission lines upon, within and across any of the public highways of this state as is provided by law for persons, firms, associations and corporations engaged in generating and transmitting of electric current within this state. Before any city of the second class or village shall make any contract with any person or corporation within or without such city or village for the furnishing of electricity, power, steam, or other product to such city or village, or any such municipal plant within such city or village, the question shall be submitted to the electors voting at any regular or special election upon the proposition, and such city of the second class, or village may by a majority vote at such election, vote bonds or taxes for the purpose of defraying the cost of such transmission line and connection with any person, firm, corporation or other city or village with which it may enter into a contract for the purchasing of electricity, power, steam or other product. The question of issuing bonds for any of the purposes herein contemplated shall be submitted to the electors at an election held for that purpose, after not less than twenty days notice thereof shall have been given by publication in some newspaper published and of general circulation in such municipality, or, if no newspaper is published therein, then by posting in five or more public places therein. Such bonds may be issued only when a majority of the electors voting on the question, favor their issuance. They shall bear interest, payable annually or semi-annually, at the rate of not to exceed six per cent per annum, and shall be payable any time the municipalities may determine at the time of their issuance, but in not more than twenty years after their issurance. The council or board shall levy annually a sufficient tax to maintain, operate and extend any system or plant, and to provide for the payment of the interest on, and principal of, any bonds that may have been issued as herein provided.

"Nothing herein shall be construed as granting power to any city of the second class or village to construct and maintain transmission lines outside of such city or village for the purpose of selling electricity, power, steam, or other product of its plant to another municipality or the residents therein."

This section, in like manner as Section 4397, which the court had

under consideration in the Sargent case, provides that the village (to whom the electricity is to be furnished) "may vote bonds or taxes for the purpose of defraying the cost of such transmission line and connection." We find no difference in principle between the financing authorized in the Sargent case and that contemplated in the proposed contract between Minden and Axtell, to wit, the pledging of revenue from the operation of the transmission system, rather than the issuance of bonds or the levying of taxes, to pay for the cost of such system. If any difference or distinction does exist, it surely is one of degree and not in principle. The grant of power to enter into such contract may imply, as the court said in the Sargent case, "a means of exercising it in addition to specific statutory methods without restriction as to others." The rule announced is, we believe, applicable to your situation.

There is one provision, however, in Section 4317, to which we call your attention, especially in its possible application to the proposed plan of supplying electricity to users who might "hook on" to the transmission line outside the corporate limits of Axtell. We refer to the second and last paragraph in Section 4317. Clearly, Axtell is not authorized, independently of its service purchase contract with Minden, to "construct and maintain transmission lines" outside of its corporate limits for the sole purpose of selling electricity to residents of the county. Whether such "hook-ups" are authorized as purely incidental to the main purpose and use to which the contemplated transmission line is to be devoted, presents a question of considerable difficulty. We are inclined to the opinion, however, that if this issue were presented to our Supreme Court, this part of the section would be held to restrict the village to the main purpose of the transmission line, to wit, the furnishing of electricity to the village and its inhabitants only.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

(Note: See Initiative Law passed at General Election November 4, 1930).

CITIES AND VILLAGES—SUNDAY MOVING PICTURE SHOWS—INITIATIVE AND REFERENDUM

March 31, 1930.

Mr. Newton R. McAdams,
Arnold, Nebraska.
Dear Mr. McAdams:

Your letter of March 27 at hand with reference to Sunday moving picture shows.

Only in towns that have adopted the initiative and referendum is a vote on any question mandatory; in other cities and towns such a vote is only directory and to let the town board know the will of the people. You do not state whether or not your town voted on this question under the initiative and referendum. Not very many towns have adopted the initiative and referendum. Even if the vote was under the initiative and referendum, it is of course not perpetually binding. It would appear to me from what you say in your letter that under the circumstances at the present time the matter is up to the town board. The town board can at any time pass an ordinance to permit or prohibit Sunday movies unless the matter is legally submitted to a vote of the people under the initiative and referendum.

If your town does not have initiative and referendum, and you want to secure a legal vote on this question, you will first have to submit to the people of your town the quesion of adopting the initiative and referendum. If the people decide at that election to adopt the initiative and referendum, then it would be necessary to have a second election to vote on the question of Sunday movies.

If you decide to do all of this, you ought to have some competent private attorney prepare the necessary petitions and papers for you.

Sincerely yours,
C. A. SORENSEN, Attorney General.

CITIES AND VILLAGES—OCCUPATION TAX

May 8, 1930.

Mr. Orin J. Lathrop,
1221 M Street,
Aurora, Nebraska.
Dear Sir:

In your kind letter of May 5, 1930, you state and inquire as follows:

"Would an ordinance passed by the city council of Aurora, Nebraska, providing for an occupation tax of $2.50 per day for laundry wagons and bread wagons from out of town, soliciting

business in Aurora, be called an excessive or 'unreasonable' tax?

"Would $5.00 a day be unreasonable?

"Would it have to provide 'so much a day' and 'so much per year' or would the price per day be sufficient?"

Answering your last question first, Section 4287, Compiled Statutes of Nebraska, 1922, which authorizes cities to levy occupation taxes by ordinance does not specify whether the tax shall be so much a day or so much per year. Since the statute confers the power in general terms, it is our opinion that the city may by ordinance provides whether the tax shall be by the day or by the year and that any provision it makes in that regard will be valid.

In answer to your first question we will state that in the case of Caldwell v. Lincoln, 19 Neb. 569, our Supreme Court held that occupation taxes "must be reasonable, considering the nature of the business and not so high as to prohibit the carrying on of the business."

In that case the ordinance under consideration provided an occupation or license tax of $12.00 per day on the business of selling at public auction bankrupt stocks of merchandise. The Supreme Court held this ordinance void because a tax of $12.00 per day appeared unreasonable at a glance.

However we are unable to state from the facts appearing on the face of your letter that either $2.50 per day or $5.00 per day would be an unreasonable occupation tax for transient laundry and bread wagons soliciting business in Aurora. To give a catagorical answer to this question would require extensive information and careful study of the same, regarding the nature and volume of the business, the capital invested, the gross receipts and the anticipated net profits. Such a gathering and study of information we are, of course, not prepared to make in justice to our other engagements. If this tax is a vital matter in your business, we suggest that you take the matter up with your attorney with a view to bringing a suit to test the validity of the ordinance.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

CITIES AND VILLAGES—FIRE DEPARTMENT—"RUN" OU'TSIDE CITY LIMITS—LIABILITY

June 12, 1930.

Mr. Paul Haberlan,
415 Federal Trust Bldg.,
Lincoln, Nebraska.
Dear Sir:

We are pleased to answer the questions contained in your letter of June 9, 1930, as follows:

1. Q. "Do the Nebraska statutes authorize the Fire Department of either city or village to make runs in outside territory?"

A. No. (See 19 Ruling Case Law, 786, Note 19).

2. Q. "Do the Nebraska Statutes authorize townships to maintain fire departments or to contract with cities to furnish that service?"

A. Yes. Electors present at the annual town meeting are authorized "to guard against the destruction of property in said town by prairie fire." (Laws 1927, Ch. 58, Sec. 1, Subd. 9th, Page 219).

3. Q. "Do you know of any court decisions passing upon the liability of the city or village to a taxpayer whose house burns down while the fire department is outside the city or village fighting a fire?"

A. According to all the court decisions there is apparently no such liability. The rule is stated at 19 Ruling Case Law, Page 1116 as follows:

> "The extinguishment of fires is a function which a municipal corporation undertakes in its public, governmental capacity and in connection with which it incurs no civil liability, either for inadequacy in equipment or for the negligence of its employees. It is well settled that a municipal corporation is not responsible for the destruction of property within its limits by a fire which it did not set, merely because, although it has established a fire department, through the negligence or other default of the corporation or its employees, the members of the fire department failed to extinguish the fire." (See also Thompson v. City of Albion, 115 Neb. 208).

4. Q. "What is the law as to the liability of a city or village should the fire apparatus injure someone along the road?"

A. "It has been held that a city or town is not liable for injuries to a traveler on the highway who is run down by the negligent driving of fire apparatus." (19 Ruling Case Law, 1117, Note 19).

If the fire department is operating outside the city or village limits when the injury occurs along the road outside the limits, and it is held the fire department is thus acting outside the scope of its authority or **ultra vires,** the following rule applies:

> "It is accordingly well settled that when a municipal corporation undertakes a function not delegated to it by the legislature, it is not liable for negligence or misconduct in the performance of that function." (19 Ruling Case Law, 1138, Note 12; Murray v. Omaha, 66 Neb. 279).

5. Q. What is the law "as to the liability of each individual fireman on the run?"

A. "When a public officer goes outside the scope of his duty, he is not entitled to protection on account of his office, but is liable for his acts like any private individual." (See 46 Corpus Juris, 1043, Note 5).

With kind personal regards, we are

Sincerely yours,
C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

ELECTIONS, TOWNSHIP—CITY ELECTORS WITHIN TOWNSHIP

July 31, 1930.

Mr. F. N. Bockes,
Orleans, Nebraska.
Dear Sir:

This is in answer to your kind letter of July 26, 1930, stating that Orleans township contains Orleans city having more voters than the rural part of said township and that the urban voters vote taxes and vote and locate public improvements on both the urban and rural parts of the township, with no right in the rural voters to vote in the city election. You inquire:

> "I am wondering as to the legality of the citizens or voters of the city having any right to vote in a township election."

By Laws 1927, Chapter 54, Page 209, all citizens of the township who have the qualifications of voters at general elections are qualified to vote at the township meeting. The law does not disqualify those township electors who live in any city or village of the township.

The county board, of course, has the power to change the boundaries of the township and make new towns (Section 970, Compiled Statutes of Nebraska, 1922; State v. Town of Golden, 99 Neb. 782). If the rural inhabitants of Orleans township can persuade the county board to make some such readjustment of townships or township lines, it may be that some of the inequalities you refer to will disappear.

But we regret to say that we fail to find any other and more certain remedy provided by law.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

CITIES AND VILLAGES—TAXATION—MAXIMUM LEVY

September 6, 1930.

Mr. Ted R. Frogge,
Attorney-at-Law,
Elwood, Nebraska.
Dear Sir:

This is in answer to your kind letter of September 3, 1930, requesting opinion as to whether, when the village has levied the full five mills authorized for the general fund by Section 4280, it may levy $600.00 more for public lighting as provided by Section 4291.

It seems to us, as it apparently seems to you, that such light levy is authorized by Section 4281, which provides that the village shall have power to levy any other (additional to levy for general fund) tax * * * authorized by law. There is a recognition of the principles involved in this opinion in U. P. R. Co. v. Hener, 97 Neb. 436, wherein our Supreme Court held, under Section 4281, that the municipality could levy the full amount for the general fund and ten mills additional for the water fund.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

AUTOMOBILE—DRIVER'S LICENSE—RESIDENCE

December 4, 1929.

Honorable George A. Williams,
2705 Glendower Avenue,
Los Angeles, Calif.
Dear Mr. Williams:

Your letter of November 22nd at hand in which you ask the following question:

"Is it lawful for county clerk to issue drivers license to

person temporarily absent from the state?"

In our opinion it is lawful for the county treasurer to issue such a license. Many of the state officers and members of the supreme court live in Lincoln but nevertheless have their drivers' licenses issued by the county treasurer of the county where they vote. The drivers' licenses should be issued by the county treasurer of the county where the driver is actually a resident, without regard to where the driver may be temporarily located. Ordinarily the driver's license should be issued in the same county that the automobile license is issued. Since your permanent residence is in Fillmore County it is our opinion that you are entitled to receive a license from the county treasurer of that county.

As per your request we are sending a copy of this letter to the county treasurer of Fillmore County.

Sincerely yours,

C. A. SORENSEN, Attorney General.

AUTOMOBILES—REGISTRATION—DOMESTIC CORPORATIONS

November 15, 1929.

The Crete Mills,
Crete, Nebraska.
Gentlemen:

You make inquiry as to the requirements of the Nebraska statutes concerning registration of motor vehicles especially in regard to the particular county or counties in which domestic corporations shall make application and be registered. As stated in 14 C. J. 338:

> "As to the domicile or residence of a corporation within the state of its creation the general rule sometimes expressly declared by statute is that, for the purposes of jurisdiction, venue of actions, taxation and other purposes, its domicile or residence therein is in the county and city, town or district in which its principal office or place of business is located, although it may also have offices or places of business elsewhere."

See also Western Travelers Accident Association v. Taylor, 62 Neb. 783, at page 793.

We take it that your corporation is organized under the laws of this state and has its principal place of business in the city of Crete. Therefore your legal residence or domicile is in that city.

Section 8396, Compiled Statutes of Nebraska for 1922 as amended by Chapter 159, Laws 1925, and Chapter 144, Laws 1929, Pages 505-506, provides:

> "Any person applying for or taking out motor vehicle registration in any county other than that in which such person actually resides or conducts a bona fide business, at the time of taking out such license shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in the sum of not less than $5.00 nor more than $25.00."

It will be noted that this penal provision in the motor vehicle registration laws seems to extend to the owner of such vehicle the option of registration either in he county of his residence or the county where "he conducts a bona fide business." There is no such optional provision in the section dealing directly with the place and mode of registration. This is Section 8365, Compiled Statutes of Nebraska for 1922, as amended by Chapter 159, Laws 1925, and Chapter 151, Laws 1929, and provides that the owner shall make application for registration "on a blank to be furnished for that purpose by the county treasurer of the county of which the owner resides."

Giving full effect to the provision of the penal section it appears to us that the same broadens the effect of the section last quoted and that in your case you have the option of registering your trucks either in Saline counry where yout principal place of business is located, or as to your trucks operating in other counties of the state in connection with places of business which you have established in such counties, to register such trucks in such other counties.

In any event, we believe that a registration of all of your trucks operated in this state may be properly and legally registered in Saline County. This would, of course, not relieve you from any lawful wheel tax assessed against particular trucks by municipalities in which such trucks are operated.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General

BANKS—DEPOSIT OF COUNTY AND SCHOOL DISTRICT FUNDS—LIABILITY OF TREASURERS

December 5, 1929.

Mr. Hadley Kelsey,
County Attorney,
Norfolk, Nebr.
Dear Sir:

You inquire:

> "In the case of a County School District Treasurer depositing school funds in a bank that he picks himself, but with the knowledge of the school board, if the bank fails, is the Treasurer liable? If the board designates the bank and then the treasurer puts the money in the designated bank and the bank fails is the treasurer liable?"

Allow me to say in answer to both your questions that in my opinion the school district treasurer is liable for school money that he deposits in a bank. I believe this to be true even though the school board designates the bank in which the deposit is made. I do not recall any provision of statute that authorizes the deposit of school money in a bank. I am of the opinion the school district treasurer is liable for such a deposit just as much as he would be liable if he gave the keeping of such money into the hands of a private person. For the liability of a public officer in such cases see Bush v. Johnson County, 48 Neb. 1. This case was decided before there was a law providing for the deposit of county money in banks. Since that time laws have been passed providing for the deposit of county and city money in banks under certain conditions. Where those conditions are complied with the treasurer is not liable for city or county money so deposited.

Very truly yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

USURY—FOREIGN CORPORATIONS

February 19, 1930.

Mr. C. G. Perry,
County Attorney,
Bridgeport, Nebraska.
Dear Sir:

Referring to your inquiries of February 8 and February 13, the latter inclosing a copy of opinion of counsel for the State Finance Company, of Des Moines, concerning the business carried on by that company of

loaning money to Nebraska residents at rates which are usurious under our laws, it is our opinion that, even though this company is not "transacting business within the State of Nebraska," as those words are technically used, the loan contract which the company makes with our citizens are subject to the usury laws of this state, if sought to be enforced in our courts.

We are well aware of the well established rule to the effect that residents of two states may ordinarily by contract expressly make such contract with reference to the laws of either state; and also that the laws of the sate in which the contract is to be performed will ordinarily govern, in the absence of express provisions or intent to the contrary, even if conflicting, as to usury, with the laws of the state of one of the parties or of the forum. These rules have ben recognized by our Supreme Court. See Coad v. Home Cattle Co., 32 Neb. 761, 49 N. W. 757.

However, it seems to us that the chattel loan business and the business of making small loans in general, being a subject of specific legislation and regulation in this state, is closely analogous to the situation presented in this state some years ago when foreign building and loan associations sought to enforce in our courts mortgage loan contracts which violated our usury laws. In Anselme v. American Savings and Loan Association, 66 Neb. 520, 92 N. W. 745, it was said:

> "It has been frequently held in this state that 'a foreign building and loan association is subject to the penalties of the statute against usury.' National Mutual Building & Loan Association v. Keeney, 57 Neb. 94; Building and Loan Ass'n. of Dakota v. Bilan, 59 Neb. 458; Interstate Savings & Loan Ass'n. v. Strine, 58 Neb. 133, affirmed on rehearing in 59 Neb. 27. The policy of our law is to subject building and loan associations to strict supervision. There are many things n the organization of the defendant association, and its method of doing business, that are not allowed by our statute. **A foreign corporaton which has not subjected itself to the supervision of the state is not exempt from its usury laws.**"

The general rules which counsel for the company no doubt relv upon must yield to local considerations involving the established public policy of this state. The small loan business has in times past been conducted in some instances in flagrant disregard of the rights of the borrower. Unaccustomed as he usually is to construction of loan contracts, oftentimes seeking a loan under circumstances of dire need, he has been a subject of most grave and unconscionable oppression on the part of the money lenders. In order that the business of making small loans in Nebraska should become more directly responsible to state

authority our legislature adopted Secs. 2845 (as amended by Ch. 124, Laws of 1929) to 2856 inclusive, setting out in detail interest rates and fees which such businesses may charge in this state, requiring licenses to engage in such business, the filing of a penal bond with the Secretary of State, authorizing inspections of records, etc.

The public policy of this state has been thus clearly enunciated in unmistakeable terms and cannot be ignored in analyzing the status of the loan contracts now being made by the State Finance Company wherein interest rates of 3½% per month are charged without any effort on the part of the company to comply with our laws or to procure the license expressly required of loan companies doing business in this state.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

FOREIGN CORPORATIONS—ASSOCIATED PRESS—"COMMERCE CLAUSE" OF FEDERAL CONSTITUTION

April 4, 1930.

Mr. T. M. Metzger, Correspondent,
Associated Press,
Lincoln, Nebraska.
Dear Sir:

We have your letter of March 26, 1930, in which you say:

"Pursuant to our recent conversation, may I respectfully ask your opinion on the following two questions in connection with suggested filing by the Associated Press of a statement concerning its operation in Nebraska:

"1. Is the Associated Press subject to the provisions of Sections 7070 to 7073, inclusive, Compiled Statutes of Nebraska?

"2. If it is would the liability of the Associated Press be diminished or increased by the provisions of Sections 7078-7079 if the association complied with Sections 7070 to 7073?

"For your information I am attaching a copy describing the organization and its purposes and cooperative benefits, and a few lines of a recent letter from Mr. Jackson S. Elliott, assistant general manager, New York."

Answering your questions in the order asked permited us to say:

"1. Is the Associated Press subject to the provisions of Sections 7070 to 7073, inclusive, Compiled Statutes of Nebraska?"

The answer is not entirely free from doubt. Sections 7070 to 7073,

inclusive, Compiled Statutes for 1922, read as follows:

> "All associations, whether the same shall have been or may hereafter be organized or incorporated under the laws of this state, or by and under authority of any other state or territory, or by authority of the United States, whose object and purpose is the transmission, collection and distribution of dispatches by telegraph, shall be subject to the regulations and restrictions hereinafter prescribed by this article."
>
> "Every telegraph company and every press association or corporation engaged in the transmission, collection, distribution or delivery of telegraphic dispatches, either for private use or for publication in newspapers, shall file in the office of the secretary of state a statement, certified to under oath by its president and secretary or by two of its officers, embodying the following information, to-wit: The name of the association, amount of capital invested, character of its business, together with a true copy of its articles of incorporation or articles of copartnership, with regulations and by-laws then in force."
>
> "It shall be the duty of the secretary of state to issue a certificate to every association or corporation that has filed the statement required by the next preceding section upon payment of five dollars, which certificate shall convey authority to such association or corporation to conduct its business, within this state, under the restrictions and penalties imposed herein."
>
> "Every telegraph company, press association or corporation engaged in the transmission, collection and delivery of telegraphic dispatches, that shall refuse or fail to comply with the above provisions shall forfeit its right to carry on the collection, transmission, and delivery of dispatches for publication or for private use, and shall furthermore forfeit to the county where such business is carried on, for each and every day it so continues in violation of this article, the penal sum of one thousand dollars, to be recovered in any court of competent jurisdiction; and it shall be the duty of county attorneys to prosecute such violations of this article at the expense of the respective counties wherein said article is violated."

The bill as passed in 1883 had the following title:

> "AN ACT to prohibit extortion and discrimination in the transmission of telegraph dispatches."

If the act is valid, obviously THE ASSOCIATED PRESS is subject to its provisions for it is an "association * * * engaged in the transmission, collection, distribution or delivery of telegraphic dispatches * * *

for publication in newspapers." (Sec. 7071).

But the great bulk of the business of THE ASSOCIATED PRESS is interstate in character; its intra-state business is relatively insignificant. Its right to do an interstate business by reason of interstate commerce clause of the federal constitution cannot be restricted by the state legislature. The general rule is that a state may not in any way fetter, abridge, or interfere with the right of a foreign corporation to engage in interstate commerce, and statutes imposing conditions on or regulating foreign corporations, associations, or partnerships, are inapplicable, and inoperative as far as their interstate transactions are involved. So the United States Supreme Court in Buck Stove Company v. Vickers, 226 U. S. 205, 33 S. Ct. 41, 57 L. Ed. 189, said:

> "The statute of Kansas of 1905, requiring certain classes of foreign corporations to file statements is an invalid restriction and burden and unconstitutional as to foreign corporations engaged in interstate commerce, under the commerce clause of the Federal Constitution."

The Supreme Court of the United States in International Textbook Company v. Pigg, 217 U. S. 91, 109, 112, said:

> " 'To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.'
>
> * * * * *
>
> "How far a corporation of one State is entitled to claim in another State, where it is doing business, equality of treatment with individual citizens in respect of the right to sue and defend in the courts is a question which the exigencies of this case do not require to be definitely decided. It is sufficient to say that the requirement of the Statement mentioned in §1283 (§1358, Gen. Stat. 1905) of the statute imposes a direct burden on the plaintiff's right to engage in interstate business, and, therefore, is in violation of its constitutional rights. It is the established doctrine of this court that a State may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another State, lawfully engaged in interstate commerce, is re-

quired, as a condition of its right to prosecute its business in Kansas, to make and file a Statement setting forth certain facts which the State, confessedly, could not control by legislation. It results that the provision as to the Statement mentioned in §1283 (§1358, Gen. Stat. 1905) must fall before the Constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of the same section which provides that the obtaining of the certificate of the Secretary of State that such Statement has been properly made shall be a condition precedent to the right of the plaintiff to maintain an action of the courts of Kansas."

However, a different rule applies to THE ASSOCIATED PRESS as to its intra-state business if any. The rule laid down in 12 Corpus Juris 58, sec. 70, reads as follows:

"In the exercise of its powers to exclude or impose restrictions on a foreign corporation, a state may, without violating the interstate commerce clause of the Constitution,, control the intra-state business of a foreign corporation. * * * More specifically, a state does not interfere with interstate commerce when as to local or intra-state business * * * it prescribes the terms on which it may enter and do business therein, as by requiring it to file with a state official papers giving information as to the company, or to have a known place of business and an authorized agent in the state * * *."

In the case of Associated Press v. Com., 60 S. W. 295, the Supreme Court of Kentucky held that a Kentucky law declaring it to be unlawful for any corporation to carry on business in Kentucky without having first filed with the secretary of state a statement designating its office in that state and its agent in the state on whom process could be served, was not a regulation of interstate commerce in its application to the press dispatch company.

According to the authorities the clause in the United States Consituation conferring on Congress the power to regulate commerce among the several states does not prevent a state from enacting a valid anti-trust law pertaining to intra-state commerce. State anti-trust laws, however, do not apply to transactions involving interstate commerce.

"2. If it is would the liability of the Associated Press be diminished or increased by the provisions of Section 7078-7079 if the association complied with Sections 7070 to 7073?"

In our opinion the liability of THE ASSOCIATED PRESS, if subject to the provisions of Sections 7078, 7079, Compiled Statutes for 1922, would not be increased nor changed by the compliance of THE ASSO-

CIATED PRESS with the provisions of Section 7071, supra. All that section requires is the filing with the Secretary of State of certain information which that officer or any other person could probably obtain without much trouble form other sources. The association or corporation giving this information does not thereby consent to any jurisdiction of the state which the state did not have prior thereto, or enter into any agreement as to its conduct in the future.

Not seeing how THE ASSOCIATED PRESS can in any way be prejudiced thereby, and in order to be wholly within the law as to intra-state business, we suggest that THE ASSOCIATED PRESS submit to the Secretary of State the information which by statute he is entitled to have with reference to your business.

Very truly yours,

C. A. SORENSEN,
Attorney General of the State of Nebraska.

FOREIGN CORPORATIONS, FILING, ETC.

April 25, 1930.

Mr. C. W. Morse,
Attorney-at-Law,
Newhouse Building,
Salt Lake City, Utah.
Dear Sir:

We have your letter of the 21st in which you ask for information regarding procedure of foreign corporations for authority to do business in Nebraska.

Section 634, Compiled Statutes of Nebraska, 1922, as amended by Chapter 54, Laws of 1929 provides that every foreign corporation except insurance and railroad companies and companies engaged in interstate commerce as common carriers shall appoint an agent or agents in Nebraska before it shall be authorized to engage in any kind of business in this state. It also provides that such foreign corporation shall file in the office of the Secretary of State of Nebraska a certificate from the Secretary of State or other proper officer of the state under the laws of which such foreign corporation is formed, "setting forth that such corporation has complied with the laws of such state, territory, district or country relative to the formation of corporations of its kind, and is a regularly and properly organized corporation thereunder."

Such foreign corporation is also required to make a certificate signed by the president or secretary of such corporation, and duly acknowl-

edged, and file the same in the office of the Secretary of State of Nebraska and in the office of the register of deeds of the county in Nebraska in which its principal place of business shall be located, designating its principal place of business in Nebraska and appointing an agent or agents in this state; who shall be designated by his official title, and one of whom shall reside at such principal place of business, upon whom process, or other legal notice of the commencement of any legal proceeding, or in the prosecution thereof, may be served.

We do not believe that any forms are available for these certificates, but suggest that you write to the Secretary of State, who will undoubtedly be glad to furnish you with such forms if he has any and with any other further information you may desire.

We call your attention also at this time to Section 3451, Compiled Statutes of Nebraska, 1922 requiring foreign corporations to file an annual statement in the office of the Attorney General, and also an undertaking. Inclosed herewith is a form letter which we send to foreign corporations stating the law regarding such reports, and also a form of the undertaking and annual report which this department has approved.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

EMINENT DOMAIN—FOREIGN CORPORATIONS—PIPE LINES

June 4, 1930.

Mr. Roy D. Cole,
Route 1,
Mynard, Nebraska.
Dear Sir:

This is in answer to your letter of May 28, 1930, asking several questions of which the substance is whether or not a foreign corporation, in this case an Oklahoma pipe-line construction company, can exercise the right of eminent domain in Nebraska.

We fail to find any Nebraska statutes, constitutional provisions or court decisions directly responsive to your question. What the Nebraska Supreme Court's decision of this question when reached will be, is, of course, to us unknown.

We nevertheless doubt that a foreign corporation can exercise the right of eminent domain without domesticating in Nebraska. Article 10, Section 8, Nebraska Constitution expressly denies to foreign railroad companies the right to exercise eminent domain in Nebraska. (See

State v. Scott, 22 Neb. 628; Trester v. M. P. R. Co., 23 Neb. 242; State v. Chicago, etc. R. Co., 25 Neb. 156; Koenig v. Chicago etc. R. Co., 27 Neb. 699).

Furthermore, it is well settled that "without statutory authorization by the domestic state a foreign corporation cannot exercise the power of eminent domain." (20 Corpus Juris, 542, 543, Note 84). The only Nebraska law authorizing the exercise of eminent domain by pipeline companies is Section 5081, Compiled Statutes, 1922, which confines the grant to companies conveying their product "from one point in the state of Nebraska to another point in the state of Nebraska." It also seems to us to be contrary to the best legal logic that foreign corporations which are not subject to the regulation and control of the State of Nebraska, should be considered as vested with so important an attribute of Nebraska's sovereignty as the right of eminent domain.

With kind personal regards, we are

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

BLUE SKY LAW—BUSINESS TRUSTS

June 24, 1930.

Mr. Sam Beber,
Care Stalmaster & Beber,
Attorneys-at-Law,
650-658 Omaha National Bank Bldg.,
Omaha, Nebraska.
Dear Sir:

This is in answer to your kind letter of June 21, 1930, requesting opinion upon the following question:

> "Whether a company doing business as an express trust authorized by a declaration of trust under the statutes of the state of Oklahoma and in all other respects, meeting the standards required of securities in the state of Nebraska, may sell its certificates of participation or certificates of stock in the state of Nebraska."

Sections 8114 and 8117 are parts of the Blue Sky Law. They refer to "declaration of trust associations" and to "trustees". These references make it plain to us that declaration of trust companies were considered by he Blue Sky Law as business organizations which might have the right to issue and sell their certificates of participation of stock.

This department has previously advised that declaration of trust companies are without legal status in Nebraska as corporations and are in legal effect partnerships whose trustees have the liability of partners (Report of the Attorney General 1919-1920, Page 160). But, of course, as "partnerships" such companies are also recognized by Section 8114 and 8117 as potentially and conditionally entitled to issue and sell their certificates of participation, shares or stock.

Nevertheless, since the rendition of the above opinion, the Bureau of Securities has consistently declined to grant stock issuance and sale permits to declaration of trust companies. For such refusal, however, this department's aforesaid opinion can scarcely be regarded as controlling authority. That opinion, though well-reasoned, ably expressed and persuasive, is not supported by any legal authorities which compel its acceptance at a greater valuation than any thoughtful reader finds it to be intrinsically worth. The Nebraska Supreme Court has not yet passed on the legal status in Nebraska of declaration of trust companies. It follows that what such status may be is an orthodox legal query upon which equally intelligent and well-informed lawyers may legitimately disagree.

We, therefore, much prefer to plant the department's authority to refuse permits to declaration of trust companies upon Section 8120. By this section the department shall issue the permit "if", among other things, "it appears to the department * * * that the proposed plan of business of the person issuing the securities is not unlawful, **unfair, unjust, unequitable or against public policy.**" In the turst plan of business the trustees are, of course, exclusively omnipotent from the beginning. The certificate holders are without any voice whatever in the management. If the management is successful, the certificate holders are the beneficiaries; and if unsuccessful, the certificate holders are the victims, with no facilities for saving themselves on the way down. The trustees have full powers of increase, decrease, substitution and self-perpetuation in their own ranks. It, therefore, requires no great stretch of the reason or imagination to see why the department consistently regards as "unfair, unjust, unequitable and against public policy," the trust plan of business which from its inception is potentially fraught with such grave dangers to the investor. Thus while declaration of trust associations are conditionally entitled with corporations and other business groups to issue and sell their non-exempt securities, it is difficult to visualize any declaration of trust case in which the required condition will be practically fulfilled without divine assurances of safety to the certificate holders.

As to the organization you refer to, viz., Petroleum Royalties Company, you state:

"Since February 1926, this company's average net earnings, after deducting all prior charges, have been greatly in excess of one and one-half times the annual dividend requirements on this and all other outstanding certificates of equal rank."

Of course, if such are the true facts with reference to the earnings of said company, there would seem to be no doubt about its right to sell its certificates of participation or stock without a permit, as authorized by Laws 1925, Chapter 32, Sec. 1, Subd. k (2), Page 197, quoted in the memorandum attached to your letter. But, since the burden of proving exemptions from the Blue Sky Law is on the claimant, the company should be advised of the necessity for being right and keeping right on the facts which entitle it to exemption.

It is, however, quite possible that the answer thus far, in which you and ourselves probably concur, does not dispose of every problem suggested by your inquiry. As held in McCleery v. Allen, 7 Neb. 21, "where a trust is created and declared, it must be capable of being executed without conflicting with the laws of the state."

In this connection, it is very obstrusively the law of Nebraska that business trusts which, either in tendency or in actual operation, control prices, restrain trade or prevent competition, are unlawful (Secs. 3420 and 3448 to 3469; Marsh-Burke Co. v. Yost, 98 Neb. 523; Nebr. Wheat Growers Assn't. v. Norquist, 204 N. W. 799).

By Section 8119 plenary inquisitorial power is conferred upon the Department of Trade and Commerce to ascertain any violations of the "purpose, terms or provisions" of the Blue Sky Law by both applicants and non-applicants for a permit. By Section 8120, the department is required to satisfy itself that an applicant's "proposed plan of business * * * is not unlawful." Reading together, as we must, these two provisions of the Blue Sky Law, we would not want to say that the Department of Trade and Commerce was without authority to inquire into the legality of the proposed plan of business of a trust association which did not apply because it regarded itself as exempt.

Thus, with all due allowances and reservations for both the prudential and the legal infirmities to which business trusts are continually exposed, an affirmative answer to your question is, in our opinion, indicated.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

TOWNSHIPS—PUBLIC LIABILITY

March 26, 1923.

Mr. Wm. Bislow,
Franklin, Nebraska.
Dear Sir:

We have your letter of the 18th in which you ask certain questions regarding the liability of a township for injuiry to person occurring while working on the roads in such township.

Replying to your first question, a township is not required to carry liability insurance. Section 3069 of the Compiled Statutes of Nebraska for 1922 expressly excepts governmental agencies from the provisions of this section requiring employers to carry liability insurance.

You ask if the township is liable when the road overseer calls out neighbors to help on roads for two or three days and one of them gets hurt. This depends largely on the circumstances of the particular case. In counties under township organization, as I presume yours is, the township has charge of maintaining the roads within its limits, and the road overseer is the agent of the township. The township, like other governmental agencies is subject to the provisions of the employers' liability law and must pay compensation like any other employer to employees injured in the course of their employment. In the case you mention, however, where neighbors are called out to work for only two or three days on the roads, I am of the opinion that their employment is merely casual, and that they would not be entitled to compensation under the employers' liability law.

However, if the employee was injured by reason of negligence of the road overseer or some other employee or agent of the township, he might have a valid claim for damages by reason of the injuries sustained, even though he has no claim for compensation under the employers' liability law.

You ask if the town board has authority to pay such claims. It has authority to pay any valid legal claim against the township. Whether the town board has authority to compromise or settle such claim out of court may be quesionable, but I am of the opinion that where it does so upon the advice of the county attorney that such action is valid. There can be no question, however, about its right to pay a valid judgment which has been obtained against the township.

You ask who is responsible for accidents on township roads. This depends entirely on the circumstances connected with the accident. If the accident is due in whole or in part to the negligence of the township or its officials, agents or employees, I would say that the township

is liable, although other parties may also be liable for the same accident.

Yours very truly,

C. A. SOENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

AGRICULTURAL SOCIETIES—COUNTY FAIRS

July 10, 1930.

Dr. M. M. Sullivan,
Spalding, Nebraska.
Dear Sir:

With reference to our recent correspondence regarding the right of the Spalding Agricultural Society to receive aid from the county for its fair, and in confirmation of our telephone conversation this morning, I call your attention to the fact that Section 6, Compiled Statutes of Nebraska, for 1922, contained a provision authorizing a division of the county fund for fair purposes between two or more societies. This provision was omitted from the act as amended in 1929 (Chap. 5, Laws 1929).

Section 67, Compiled Statutes of Nebraska, 1922, provides:

"Whenever any county shall have established a county fair under the provisions of this act no money shall be paid by the county to any other society or association maintaining a fair within the county."

It is our opinion that as long as the county fair established under the provisions of Section 57, et seq. Compiled Statute, 1922, continues to function and hold county fairs, the county board would have no legal authority to give aid to any other agricultural society for that purpose but whenever the county fair so organized ceases to hold its annual fair the county board may grant aid to another agricultural society for the purpose.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

FOREIGN CORPORATIONS—HOLDING REAL ESTATE

October 7, 1930.

Mr. James A. Cassler,
Attorney-at-Law,
McPherson, Kansas.
Dear Sir:

We have your letter of the 2nd asking for information regarding the laws of this state pertaining to the right of foreign corporations to hold real estate in Nebraska.

Section 5687, Compiled Statutes of Nebraska for 1922, provides:

> "Aliens and corporations not incorporated under the laws of the State of Nebraska are hereby prohibited from acquiring title to or taking or holding any land, or real estate, or any leasehold interest extending for a period for more than five years, or any other greater interest less than fee in any land, or real estate in this state by descent, devise, purchase or otherwise, only as hereinafter provided."

However, Section 5690, Compiled Statutes for 1922 modifies Section 5687 by providing that the provisions of the article do not apply to real estate lying within the corporate limits of cities and towns.

A foreign corporation may domesticate in Nebraska under the provisions of Section 479, Compiled Statutes for 1922, which is as follows:

> "Any corporation organized under the laws of any other state or states, territory or territories, which has filed, or may hereafter file with the secretary of state of this state, a true copy of its charter or articles of association, shall, on filing with the secretary of state a certified copy of a resolution adopted by its board of directors, accepting the provisions of this article, be and become a body corporate of this state."

I believe if your client corporation would domesticate in Nebraska as provided in Section 479 above quoted, that it would be entitled to the same rights with respect to holding title to real estate in Nebraska that are enjoyed by corporations organized under the laws of this state.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

STATE RAILWAY COMMISSION—JURISDICTION—FUNCTIONS

October 8, 1930.

Mr. C. E. Bellew,
Examiner Securities Dept.,
Department of State,
Des Moines, Iowa.
Dear Sir:

You make inquiry as to the laws of this state pertaining to the regulation by a public utilities commission of the issuance of securities of public utilities and the regulation of their rates.

There is no public utility commission, so called, in this state. The State Railway Commission, however, exercises many of the functions

of such a commission. The Railway Commission is a constitutional body organized under Section 20, Art. IV. of the Constitution of Nebraska. Its powers are very extensive, the constitutional section creating it being self operative as to the commission's power, "in the absence of specific legislation," to regulate "rates, service and general control of common carriers."

You are referred to the following sections of our statutes for matters over which the commission exercises regulatory powers, along the lines of your inquiry.

Rates of "Common Carriers" Generally ("in absence of specific legislation"): Sec. 20, Art. IV., Constitution of Neb.

Issuance of Securities by Common Carriers and Public Service Corporations: Ch. 141, Laws of 1925 (Amending Sec. 676, Comp. St. Neb., 1922, as amended by Ch. 168, Laws of 1923); Secs. 677-678, Comp. St. Neb., 1922.

Issuance and purchase of Securities—Interurban Railways: Secs. 5570-5577, Comp. St. Neb., 1922.

General Powers re Rates and Regulation of Railway Companies and "Common Carriers" (railroads, express companies, telephone companies, telegraph companies, etc.): Art. X of Ch. 59, Comp. St. Neb., 1922; especially Secs. 5466-5472, 5483-5494, 5503-5506, 5512, 5520.

Transfer Facilities—Charges: Laws 1923, Ch. 161 (See also Secs. 5380-5381, Comp. St. Neb., 1922).

Rates and Fares: Miscellaneous provisions: Secs. 5423-5424, 5440.

Demurrage: Sec. 5549, Comp. St. Neb., 1922.

Rates and Charges—Stock Yards: Secs. 142-143, Comp. St. Neb., 1922.

Physical Connection, Service and Rates of Electric Transmission Companies (outside of corporate limits of cities and villages): Ch. 143, Laws of 1925.

Rates, Service and General Control of "Pipe Lines" (including oil lines): Ch. 173, Laws of 1923. (Note: This law purports to amend a law passed in 1917 (Ch. 175, Laws of 1917; Secs. 5088-5096, Comp. St. Neb., 1922) declaring individuals, corporations, etc. engaged in business of storing, transporting or conveying salt, alkali lime and other mineral solutions, to be common carriers, subject to the provisions of the law now ap-

pearing as Art. X, Ch. 59, above referred to).

Minimum Rates for Public Utility Service, Established by Order of Commission, Invalid: Ch. 172, Laws of 1923.

Rates—Oil or Gas Pipe Lines (defined as common carriers and subject to general powers of Railway Commission in Art. X, Ch. 59, above referred to): Sec. 5081, Comp. St. Neb., 1922.

Rates—Express Companies—Special Provisions: Secs. 7132-7137, Comp. St. Neb., 1922.

Telephone Tolls—Special provisions: Ch. 163, Laws of 1923.

Rates—Telegraph Companies: Secs. 7084, Comp. St. Neb., 1922.

Rates—Motor Transportation—Common Carriers: Although the matter of rate fixing is specifically excepted in provisions of Ch. 150, Laws 1927, pertaining to the regulatory powers, see general power in Sec. 20, Art. IV of Constitution, above referred to.

Public Warehouses—Enforcement of Statutory Rates and Regulations: Secs. 7224-7231, Comp. St. Neb., 1922.

Irrigation—Water Rates: Sec. 8477, Comp. St. Neb. 1922.

(Note: Rates—Light, heat and power districts: Sec. 7153, as amended by Laws of 1923, Ch. 169, invalidated in 112 Neb. 86; curative act (Chapter 89, Laws of 1925) also held invalid in 114 Neb. 540; and curative act (Chapter 106, Laws of 1927) held unconstitutional, 229 N. W. 773).

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

CORPORATION—STOCKHOLDERS, VOTING

March 2, 1929.

Mr. R. E. Brega, Attorney,
Callaway, Nebr.
Dear Sir:

Your letter of February 22nd at hand. Section 5 of Article 12 of Nebraska Constitution provides that—

> "The legislature shall provide by law that in all elections all directors, all managers of incorporated companies, every stockholder shall have the right to vote * * *."

It follows that no stock can be issued which does not carry with it the right of the owners thereof to vote on the same basis as the holders of the common stock. This ruling is now being followed by all Nebraska corporations having preferred stock.

Sincerely yours,

C. A. SORENSEN, Attorney General.

INSURANCE—HAIL ASSESSMENT ASSOCIATIONS—PAYMENT OF LOSSES

May 7, 1929.

Mr. K. C. Knudson,
304 Peters Trust Bldg.,
Omaha, Nebraska.
Dear Sir:

Speaking with reference to assessment hail associations organized under the provisions of Section 7871, Compiled Statutes which provides among other things that: "At the option of the association the state may be divided into districts of not less than fifteen counties each, for the purpose of making assessments according to the hazards in each district," you inquire:

> "Can such a Hail Association by its Articles of Incorporation or by its By-Laws, fix it so that each such district is independent of the others to such an extent, that supposing the policy-holders in one district pay in a greater assessment than needed to pay losses with, but in the other district the losses are greater than the first fixed assessment?
>
> "Can the same such Hail Association pay dividends to policy-holders living within the district where the business shows profit and in the other district where business show loss, can it make additional assessment on such policy-holders within that district to pay for such losses occurring there where first assessment is not sufficient to pay losses with?"

In answer to your question I will say that I doubt whether the law contemplates such a plan of doing business as your questions suggest. It seems to me the law contemplates that when assessments have been made each member who has suffered loss shall receive his just proportion of the amount raised thereby. The law provides for a difference in rates based on a difference in the location of the property insured but I find no authorization in the law for a difference in the percentage that each loser shall receive of his insured loss.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

FOREIGN CORPORATIONS—NON-PAR STOCK—DOMESTICATION

June 4, 1929.

Mr. Frank Marsh,
Secretary of State,
State House,
Lincoln, Nebraska:
Dear Sir:

You submit to this department for answer a letter received by you from Karl F. Crass, Esq. of the Denver Colorado bar in which he says among other things:

> "I represent a Colorado corporation with no par value stock. This corporation contemplates domiciling in the State of Nebraska. Examining the Nebraska statutes, I find no specific provision relating to the domiciling of foreign corporation with no par value sotck. Furthermore, Sec. 684, if read in connection with Sec. 681 of the 1922 Compiled Statutes of Nebraska, seems to be altogether inapplicable to such foreign corporations."

and in which he asks for information regarding the domiciling of the corporation he represents in this state.

In answer to Mr. Crass' question, I will say that Section 479. Compiled Statutes of Nebraska, 1922, provides that

> "Any corporation organized under the laws of any other state or states, territory or territories, which has filed, or may hereafter file with the secretary of state of this state, a true copy of its charter or articles of association, shall, on filing with the secretary of state a certified copy of a resolution adopted by its board of directors, accepting the provisions of this article, be and become a body corporate of this state."

I take it that the corporation is a stock company and that its capital stock has some value although its shares of stock have no par value. This being true, I am of the opinion that you will be justified in charging a filing fee based upon the value of the authorized capital stock of the corporation. It may be that this value will be difficult to fix but it occurs to me that in no event should it be less than the net value of the property of every description that has already been turned into the company in payment for shares of its capital stock.

Section 681 and 684, Compiled Statutes of Nebraska, 1922, to which

Mr. Crass refers in his letter have to do with the payment of an occupation tax by corporations, both domestic and foreign, doing a business in Nebraska.

I am of the opinion that some equitable basis for the payment of such a tax can probably be arrived at even though the corporation stock may have no par value. That is far from saying it has no actual value. Mr. Crass' letter gives no information as to the nature of the business which the corporation he represents proposes to carry on.

If the corporation proposes to sell any of its stock or securities in Nebraska it should take the matter up with the Department of Trade and Commerce which has charge of the administration of the "Blue Sky Law." The stock of all companies licensed by that department under the provisions of the "Blue Sky Law" must have a par value.

Respectfully submitted,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

CORPORATIONS—SURVIVORSHIP (JOINT TENANCY) IN STOCK OWNERSHIP

October 7, 1929.

Mrs. Agnes D. Roberts, Treasurer,
Nebraska Women's Christian Temperance Union,
1922 South 51st Street,
Omaha, Nebraska.
Dear Madam:

In answer to your inquiry of September 28, 1929, in which you write as follows:

"Mr. C. A. Sorensen,
Attorney General,
Lincoln, Nebraska.
Dear Sir:

Interested parties have appealed to me to know if Nebraska has a state law whereby a deed or stock in a corporation, such as Building & Loan Ass'ns, might be made out in the names of two parties, so that upon the death of either one, the survivor will become entitled to the property or stock, without administration papers.

For example:

Frank Jones and Mary Jones, as joint tenants with right of survivorship, and not as tenants in common, etc.

Thanking you, I am

Sincerely yours,"

It is our opinion that it is legal in this state to issue either deeds or corporate stocks in the names of joint tenants as distinguished from tenants in common; that is, the survivor of such grantees or holders take all the interest of the deceased holder immediately upon his death without necessity of probate or administration. The form of grant or stock certificates you mentioned in your letter is proper and in general use.

The only reference we find in our state statute pertaining to joint tenancy of corporate stocks is in Section 8089, Compiled Statutes of Nebraska for 1922, providing for joint tenancy in building and loan association stocks.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

CORPORATIONS—HOLDING COMPANIES—BANK STOCK

November 20, 1929.

Mr. E. H. Luikart,
Lincoln National Bank & Trust Co.,
Lincoln, Nebraska.
Dear Sir:

You make inquiry as follows:

> "May a corporation be lawfully organized in Nebraska to conduct the business of buying, owning, selling and otherwise dealing in the capital stock of banking corporations in this state?"

But for certain decisions of our Supreme Court we would feel confident that such a corporation could be thus organized and could lawfully conduct its business in this state.

Private business corporations are organized in this state under general laws only. (Sec. 1, Art. XII of the Nebraska Constitution). That is to say, the statutes in general terms define the method of organization of, and the powers to be exercised by, private corporations. These general laws, for the most part, leave to the incorporators the matter of defining the powers of, and nature of business to be transacted by the corporation. Thus the charter of the corporation is composed of two basic elements: First, the general statutes authorizing incorporation, and, second, the articles of incorporation. (Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279; Livesey v. Omaha Hotel, 5 Neb. 50).

Section 458, Compiled Statutes of Nebraska, 1922, provides:

"Any number of persons may be associated and incorporated **for the transaction of any lawful business.**"

Sections 459 and 460 enumerate powers which every corporation, **"as such"** whether specified in the articles of incorporation or not, may exercise.

Section 461 provides that every corporation not formed by legislative enactment **"must adopt articles of incorporation** and have them filed."

Section 465, pertaining to the contents of the notice of incorporation to be published, provides that "such notice must contain (among other things) **the general nature of the business to be transacted.**"

Certain other powers are granted by the statutes, to wit: conveyance of real estate, Sec. 471; suits by corporations against members, Sec. 472, etc.

It would appear obvious, therefore, that the **"transaction of any lawful business"** is the test, and practically the only test, that should be applied when considering the legality of corporate life and corporate powers in this state. So long, therefore, as its articles of incorporation and by-laws for the management of its affairs (See Sec. 459) are confined to the enumeration of powers, duties and regulations lawful in their intent and purpose, the corporation would seem to pass the test just mentioned.

The rule as to the power of a corporation to own stock in another corporation is stated conversely in 14a C. J. as follows:

"The rule supported by the great weight of authority is that a corporation cannot take and hold stock in another corporation, unless such power has been expressly granted to it or conferred by necessary implication."

In 14 C. J. 105, it is said: "* * * one private corporation may, either by original subscription or by purchases become a stockholder and member of another corporation, with all the rights and liabilities attaching to such relation, either when it is expressly authorized by its charter to do so, or when such subscription or purpose is within its implied power as a necessary or proper means of exercising the other powers conferred on it."

In 14a C. J. 285, it is said: **"When not contrary to the general law,** a corporation when specifically authorized by its charter may purchase stock in other corporations."

Corporate charters were originally grants from the crown. In this country they arise wholly from legislative enactment, either in the form

of special acts of incorporation or general statutes pertaining to the organization of business corporations generally. Naturally, when the general statutes do not attempt to define, designate or limit, in detail, powers of the corporation organized under such general statute the powers of the corporation may, and properly should be set out in the articles of incorporation. Therefore, when the powers thus enumerated are not violative of the general provisions of the statutes and do not contravene any principle or rule of public policy, there appear to be no sound reasons why such a corporation cannot conduct its business in accordance with its purpose and powers as set forth in its articles of incorporation.

We believe that much of the confusion that has arisen in this field would have been avoided if the courts had at all times recognized the distinction between charters by special act and charters created under general laws. The rule seems practically undisputed that the power of a corporation to buy and hold stock in other corporations will not be implied and that it is a power that must be specifically stated in the corporation's charter. If the corporation's charter consists, as we have already said, of the general statutes and its articles of incorporation, it would appear that the power might arise from either or both of such sources.

The English courts seem to have recognized this principle. In re Barned's Banking Co., Law Reports 3 Ch. App. 105, it was held, as stated in 36 Am. St. Rep., at Page 139 (note), that "when the articles of incorporation make the acquisition of stock in another corporation one of the purposes of the first corporation, there is nothing in the English statutes nor at common law denouncing such purpose as unlawful."

This not in 36 Am. St. Rep 139, continues:

> "An examination of all the well considered cases sustaining the acquisition of one corporation of stock in another will, we think, show either that the charter or articles of association specially permitted such acquisition, or that it authorized the doing of some business in the doing of which it resulted that the stock came into the hands of the association incidentally, and without intention on its part, or that of its managers, in entering upon the original transaction that it should result in the ownership of such stock."

Whatever the rule may be in other jurisdictions, however, we must be bound by the decisions of the Supreme Court of this state. Although it was stated in Herrick v. Humphrey Hdw. Co., 73 Neb. 809, 103 N. W. 685, that "the powers of a corporation in effecting its objects are as

broad and comprehensive as those of an individual, when not expressly prohibited," there are two or three decisions of the court which cannot be ignored.

In Nebraska Shirt Co. v. Horton, 3 Neb. (Unof.) 888, 93 N. W. 225, suit was brought by an exposition company on a subscription to its capital stock by defendant, a manufacturing corporation. The court, speaking through Pound, Commissioner, said "we are at a loss to see how this action can be maintained on the face of the pleadings. Corporations have quite enough power without allowing them to incorporate themselves in new companies. Unless authorized by statute, a corporation has no power to subscribe to the capital stock of another corporation and such a subscription is not binding." The case just cited was cited in State v. Lincoln Traction Co., 90 Neb. 535, 134 N. W. 278, which suit involved the power of the traction company to subscribe to the stock of a local light and power company. The court said:

> "In Nebraska Shirt Co. v. Horton, 3 Neb. (Unof.) 888 we held that, unless authorized by statute a corporation has no power to subscribe to the capital stock of another corporation. And the rule is applied to a banking corporation in Bank of Commerce v. Hart, 37 Neb. 197. Sec. 9, Art. VII, Chapt. 72, Compiled Statutes of Nebraska, 1907, authorizes street railway companies to subscribe to the stock of another street railway company whose lines of railway connect with those of the subscribing company, but we have not been cited to any statute authorizing street railway corporations to subscribe to the stock of corporations organized for the purpose of transacting business other than a street railway."

In Bank of Commece v. Hart, 37 Neb. 197, 55 N. W. 631, it was held that a "banking corporation organized under the laws of this state, has no power to become a stockholder in an insurance company"; and "had this charter expressly provided that the corporation might invest its funds in stocks of insurance companies and deal generally in stocks of other corporations, such a provision would have been contrary to the laws of the state and void."

While the courts have recognized a certain difference and have distinguished between subscription to shares of new corporations and purchase of stock of old corporations, the rule in both cases is practically the same. It is true that in Folts v. Globe Life Insurance Co., 223 N. W. 797, decided by our Supreme Court in January of this year there is a certain dictum distinguishing between an investment of stocks of going corporations and subscriptions to stock in the following language "even though it be said that stocks of a going corporation may be the subject of investment, the following authorities justify the conclusion

that subscriptions for stock in the organization of a new corporation, cannot be regarded as an investment." (Citing Neb. Shirt Co. v. Horton, supra).

However, we find no holding in the Folts case which would justify the power to organize the corporation contemplated in your inquiry without a specific statute covering the same.

We believe that all of these Nebraska decisions can be explained and justified without violating the general rules which we have cited above. However, by reason of the specific and repeated mention in these cases of the word "statute" as applied to corporate charters we are not in position to say that the corporation you contemplate would be lawful in this state without specific statutory authority for the same.

This matter should be specifically decided in this state at the earliest possible date. The recent trend of chain store organization, chain banking and other similar developments in corporate business organizations makes this a vital matter for settlement by our Supreme Court so that there will be no doubt one way or the other as to the legality of the holding company idea as applied to Nebraska corporations.

This opinion does not contemplate the organization of corporations whose purposes and methods of doing business conflict in any manner with the anti-trust laws of the federal government or the trust or monopoly laws of this state. That is a different field although in some insances the courts seem to have confused such laws with the law pertaining to the matters above discussed. Except where the purpose or intent or necessary result of the corporation's organization and method of doing business are monopolistic in character or have a tendency to become a restraint upon trade and competition, there is no particular reason why the laws applicable to such situations should be considered in this connection.

Very truly yours,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

OCCUPATION TAX—FOREIGN CORPORATIONS

November 25, 1930.

Mr. Winthrop B. Lane,
Care Rose, Wells, Martin & Lane,
524 Omaha National Bank Bldg.,
Omaha, Nebraska.
Dear Mr. Lane:

This is in answer to your kind letter of November 17, 1930, in which you state and inquire:

> "Has your office ever passed upon the question of whether a foreign corporation that domesticates under Section 479 of the Compiled Statutes of Nebraska for 1922 has to pay an occupation tax on the amount of its authorized capital stock or upon the amount of capital actually used in the State of Nebraska?
>
> "We note the case of **Beatrice Creamery Company vs. Marsh**, 227 N. W. 926. In this case was the Nebraska Creamery Company a Deleware corporation that had domesticated under the above section or was it a Nebraska corporation?
>
> "Can you also inform me whether or not, in the case of **J. I. Case Threshing Machine Co. vs. Marsh**, 117 Nebr. 832, 223 N. W. 126, the said company domesticated under Section 479, or if it merely obtained authority to do business in Nebraska by complying with Section 634 of the Compiled Statutes of Nebraska for 1922?"

Our office has not heretofore passed upon the question of whether a foreign corporation that domesticates under Section 479 must pay an occupation tax on the amount of its authorized capital stock or upon the amount of capital actually used in the State of Nebraska. However in the enacting clause of Section 479 it is provided that the foreign corporation upon compliance with the provisions of said Section 479 shall be and become a body corporate of this state. This language appears to us to be a plain, direct and unambiguous declaration that foreign corporations so complying with Section 479 are domestic corporations required to pay an occupation tax on the total amount of its paid-up capital stock as definitely ruled in Beatrice Creamery Co. v. Marsh, 227 N. W. 926, and since affirmed without opinion by the Supreme Court of the United States. In the record of the Beatrice Creamery Company and J. I. Case Threshing Machine Company cases, to which you refer there is nothing which definitely informs us as to whether said companies domesticated in this state under Section 479 or merely obtained a right to do business in this state under Section 634. It might be that you could determine this question from an examination of the records

of the Secretary of State's office. It appears in the Threshing Machine Company case that said company was admitted to be a foreign corporation. In the Beatrice Creamery Company case, the writer of this letter represented the Secretary of State and therefore knows that said company was alleged and admitted to be a domestic corporation.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

AGRICULTURAL SOCIETIES—MUST FILE CLAIMS WITH COUNTY BOARD

July 21, 1930.

Mr. Leo L. Pickering,
County Treasurer,
Stockville, Nebraska.
Dear Sir:

In answer to your inquiry of July 16th, it is our opinion that an agricultural association must file claim with the county board for all monies payable to it under the law in the regular manner as claims against the county are presented, warrants to be issued in the regular way. We refer you to the following cases as our authority for this opinion.

Wilson vs. Thayer Co. Agricultural Society, 115 Neb. 579, 213 N. W. 966.

State vs. Robinson, 35 Neb. 401, 53 N. W. 213.

Sheldon vs. Gage County Soc. of Agriculture, 75 Neb. 485, 106 N. W. 474.

Polk Co. Fair Assn. vs. Polk Co., 101 Neb. 1, 161 N. W. 1030.

Owen vs. Main, 92 Neb. 258, 138 N. W. 154.

In the Wilson case above cited the court stated: "* * * such a claim is a claim against the county and must first be presented to the county board, upon whom the law places the duty of passing on claims against a county," etc.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. ROSS NEWKIRK, Assistant Attorney General.

INSURANCE—OF SCHOOL BUILDINGS IN MUTUAL COMPANY

March 18, 1930.

Mr. H. F. Anderson,
Secretary,
Board of Education,
Ashland, Nebr.
Dear Sir:

Your letter of March 7 at hand in which you ask if the Board of Education can insure its school buildings in a mutual company.

This office has repeatedly held that there is no law against school boards insuring the school buildings under their charge in mutual companies. It is a matter which is left to the discretion of the board.

Very truly yours,

C. A. SORENSEN, Attorney General.

ORDINANCES—ARREST OUTSIDE VILLAGE LIMITS FOR VIOLATION OF

October 20, 1930.

Hon. W. A. Armstrong,
Police Judge,
Greenwood, Nebraska.
Dear Sir:

This is in answer to your kind letter of October 16, 1930, requesting information as to whether the village marshal may pursue and bring back for trial from beyond the village limits a violator of the school stop signs.

Prosecutions for the violation of city ordinances penalizing acts not made criminal by the laws of the state are civil actions (Peterson v. State, 79 Neb. 132). Violating school stop signs is not an act made criminal by the laws of this state. Hence the provisions of the criminal code for apprehending the offender anywhere in the state (Sections 9967 to 9969, Comp. St. 1922) do not apply to violators of the school stop ordinance. If it is not practical to arrest and detain the offenders while in the village and at or near the time of the offense, there is nothing else that can be done under existing laws. Legislation is required to provide other and different means of redress.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Asisstant Attorney General.

GIFT ENTERPRISE—GIVING PREMIUMS WITH MERCHANDISE

March 27, 1930.

Williams-Murphy Company,
113-117 North 10th St.,
Omaha, Nebraska.
Gentlemen:

We have your letter of the 19th in which you ask as to the law regarding giving premiums with merchandise in Nebraska.

Section 9821, Compiled Statutes of Nebraska for 1922, is as follows:

> "Whoever sells or offers for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance or other place of amusement, with a promise, expressed or implied, to give or bestow, or in any manner hold out the promise or gift or bestowal of any article or thing, for and in consideration of the purchase of any other article or thing, whether the object shall be for indivdual gain, or for the benefit of any institution of whatever character, or for any purpose whatever, shall be held to be engaged in a gift enterprise which is hereby declared to be unlawful and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or both."

In the case of State v. Sperry & Hutchinson Co., 94 Neb. 785, 144 N. W. 795, it was held, however, that the statute above quoted in so far as it might be construed to prohibit the giving and redeeming of trading stamps "is an unreasonable interference with a lawful business, not within the police power of the Legislature, and is in conflict with Article I, of the Bill of Rights and the fourteenth amendment of the Federal Constitution."

In the course of the opinion in State v. Sperry & Hutchinson Co., supra, our court quotes with approval the following language from the opinion in the case of Young v. Commonwealth, 101 Va. 853, 867:

> " 'The act, as we construe it, prohibits a person from selling a given article, and at the same time, and as a part of the transaction, giving to the purchaser a stamp, coupon, or other device which will entitle him to receive from some third person some other well-defined article in addition to the one sold. This is equivalent to declaring that it is illegal for a man to give away one article as a premium to the buyer for having purchased another; for, as already intimated, it can make no possible difference that the article given away with the sale

is delivered to the purchaser by a third person instead of the seller himself. We think it is clear that such a prohibition is an unwarranted interference with the individual liberty which is guaranteed to every citizen, both by our state constitution and also by the fourteenth amendment to the constitution of the United States. * * * This inalienable right is trenched upon and impaired whenever the legislature prohibits a man from carrying on his buisness in his own way, provided always, of course, that the business and the mode of carrying it on are not injurious to the public, and provided also that it is not a business which is affected with the public use or interest.' * * * In the case at bar the element of chance or lottery is entirely wanting. There is no uncertainty or indefiniteness about the premiums. The articles are certain and fixed. * * * Indulging every possible presumption in favor of the validity of the statute now under consideration, we are constrained to the conclusion, upon reason and authority, that it is not a valid exercise of legislative power. It attempts to prohibit and restrain the defendant in the lawful prosecution of a lawful business."

Our Supreme Court seems never to have passed squarely on the legality of the practice of giving premiums with articles of merchandise, but from some of the statements contained in the opinion in State v. Sperry & Hutchinson Co., supra, it might be inferred that our court would hold that such practice was legal, provided there was no element of chance or lottery in the giving of the premiums. However, it is still an open question in this state and Section 9821, Compiled Statutes for 1922, as you will note, expressly forbids it.

Some companies manufacturing and selling food products in packages have a custom of placing articles of merchandise as premiums inside the package of food products. This practice is a violation of the pure food and drug law, and is unlawful in Nebraska.

Yours very truly,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

POOL HALLS—REGULATION BY CITY OR VILLAGE

March 26, 1930.

Mrs. Fred A. Wearin,
Vice Pres. W. C. T. U.,
Thurston, Nebraska:
Dear Madam:

Your letter of March 25th at hand in which you ask for the state law on running pool halls in small towns.

Pool halls are regulated by the ordinances of the town in which the pool hall is located. The city council or board of trustees, as the case may be, has power to abolish pool halls or to make such regulations as they see fit in connection with their operation. If you wish to know what rules and regulations your city council or village board of trustees has made with reference to the operation of pool halls in your town, you should ask the clerk for permission to see a copy of the ordinances on the subject.

Yours very truly,

C. A. SORENSEN, Attorney General.

POOL HALLS—MINORS ON PREMISES

July 24, 1930.

Mr. E. G. Caldwell,
County Attorney,
Red Cloud, Nebraska.
Dear Sir:

You state that the proprietor of a pool hall desires to install a soda fountain in the vestibule at the entrance to the pool hall from the street and put in a large window so that minors may come into the vestibule to buy ice cream without entering the pool hall.

You ask if this arrangement would violate the provisions of Section 9808, Compiled Statutes of Nebraska, 1922, forbidding the owner or keeper of a pool hall to permit minors under the age of eighteen "to remain or be in or upon the premises so occupied by him as such billiard or pool hall."

We are of the opinion that if minor children under the age of eighteen are permitted to come into the vestibule of a pool hall to buy ice cream, or for any other purpose, it constitutes a violation of Section 9808.

The word "premises" has been often defined by the courts in liquor cases to include any and all places connected with the building over which the seller of liquor has the right and does exercise authority and control. Stockwell v. State, 85 Ind. 522; People v. Higgins, 56 Mich. 159, 22 N. W. 309; People v. Miller, 79 N. Y. S. 1122; Orke v. McManus (Ia.) 115 N. W. 580 (581). When the minor steps off the street and into the vestibule leading into a pool hall he is in and upon premises controlled by the owner or keeper of the pool hall. This the statute forbids.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General

SUNDAY LABOR—STORES OPEN ON SUNDAY

November 14, 1930.

Rev. E. H. Thomas, Pastor,
Resurrection Lutheran Church,
Gretna, Nebraska.
Dear Rev. Thomas:

Your letter of November 11th at hand.

There is no state law forbidding stores being open on Sunday. It is a matter for each town to determine for itself. Cities like Lincoln and a large number of other towns do not permit grocery stores and general mercantile stores to remain open on Sunday. The village of Gretna has authority to pass any ordinance on the subject that it sees fit.

Sincerely yours,

C. A. SORENSEN, Attorney General.

NEWSPAPERS—RIGHT TO REJECT ADVERTISING

April 24, 1930.

Mr. Dan Greenberg,
Care Byrne-Hammer Co.,
Omaha, Nebraska.
Dear Sir:

This is in response to your request for a statement from this office on the law with reference to the acceptance or rejection of lawful business advertising by newspapers.

Upon this subject we fail to find any Nebraska statutes or decisions by the Supreme Court of Nebraska. However in 46 C. J., page 35, we find the following statement of the general or common law upon this subject.

> "A newspaper company may reject some class or classes of advertising entirely. It may use reasonable discretion in determining whether or not an advertisement presented is a proper one. It may determine how much space it will sell for advertising purposes, and how much it will devote to reading matter. When a newspaper company has advertising space to sell and one who applies for advertising space complies with the law and reasonable rules of the company as to the kind and character of the advertisement offered, and tenders the regular and ordinary fee therefor it is held that the company is bound to accept it."

The leading case in which these rules are discussed and laid down is Ulhman v. Sherman, 22 Oh. NPNS 225. From the above law it would appear to be that when a newspaper has the advertising space for sale and accepts a certain kind or class of lawful advertising from one individual or company for a certain price, it must for the same price accept the same kind or class of lawful advertising from other persons or companies without discrimination. The remedy for violations of these requirements would seem to be the common law civil remedy of damages.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

DELEGATION OF RULE-MAKING POWERS TO BOARDS

July 9, 1930.

Mr. F. O. Sanders,
Supervisor of Transportation,
Capitol Building,
Charleston, W. Va.
Dear Sir:

In reply to your letter of July 2, 1930, concerning the delegation of power to some administrative board of the state government to make rules and regulations violations of which are defined as misdemeanors in the law with penalties accordingly, we find no such legislation in this state as to violations of rules and regulations of the department of public works under the provisions of Section 8347 Compiled Statutes of Nebraska, 1922. Section 2794a referred to in your letter providing penalties for the violation of "this act", pertains only to prohibition against unlawful use of traction engines or heavy machines having lugs, under the provisions of Section 2794.

As you state Chapter 150 Laws of 1927, (House Roll No. 93) does make violations of rules promulgated by the State Railway Commission misdemeanors. We do not seem to have a court decision in this state directly on this subject although there is an interesting discussion of such delegation of authority in the cases of State v. Howard, 96 Neb. 279; Syndicate v. Bryan, 113 Neb. 816. We very much question the constitutionality of a statute defining as a misdemenaor any violation of rule and regulations promulgated by administrative boards unless such rules and regulations closely conform to the express requirements or provisions of the statute itself. We have no common law crimes in this state, all crimes being expressly defined by statute.

This strict rule would seem to indicate that any misdemeanor would have to be defined by the statute itself and, unless the rule and regulation in question is merely ministerial in character and follows closely the express wording and intent of the statute itself, it cannot be said that the crime has been defined by statute.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

FREE BRIDGE—RIGHT TO CLOSE

January 13, 1930.

Mr. H. B. Koop, Cashier,
Home State Bank,
Louisville, Nebraska.
Dear Sir:

From your letter of January 8, 1930, it appears that across the Platte river at Louisville there are two bridges: An old, public free bridge; and a new toll bridge owned and operated by a toll bridge company. From the contracts and other papers on file with the Department of Public Works, it appears that the state and the counties of Cass and Sarpy have an option to buy this new toll bridge but they are not bound to do so nor have they done so yet. We also find that in these contracts and papers the state and said counties, in contemplation of sometime purchasing this new toll bridge as a state and county bridge, have agreed to dispense with the public use of the old, free bridge as soon as the new toll bridge is ready to operate.

Under these circumstances, we are asked to answer your inquiries as follows:

> "First, in your opinion can the free bridge we now have, be torn down, or neglected, or condemned, or closed to the public, by the county commissioners or state, so that traffic will be forced to use the toll bridge.
>
> "Second, what is the condition of the fund out of which the state pays for bridges such as this one? And will it be sufficient to pay for its one-half of the new bridge upon completion, which is estimated to be in the late summer."

We note that the questions asked in the second branch of your inquiry are not questions of law. We are unable to give authentic answers as to the status and capacity of any state funds except such as are appropriated to the use of this department. For this information, you are referred to the Department of Public Works.

However, your first question, involving state and county authority to close to traffic the free, public bridge for the benefit of the private, toll bridge, is one of law. As such it is available and appropriate for this department's answer which is hereby given. We note that the Nebraska Supreme Court has not yet directly and officially responded to the question of authority here presented. But we assume that the agreement, for the closing of the free, public bridge for the benefit of the private, toll bridge, was made pursuant to an authority sought to be implied from the express power of counties and the state to provide by erection or purchase both free and toll bridges (Secs. 2714-2757; Secs. 8356-8363; Laws, 1923, Ch. 156).

We observe first that, in the absence of an authorized agreement to discontinue the public use of the free bridge for the benefit of the toll bridge, the toll bridge company could not legally complain of the competition of the free, public bridge. The toll bridge law allows the organization of any number of companies who may operate any number of toll bridges in close proximity or jutaposition across the same river in the same territory in free and open competition (Secs. 486 to 492; King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co., 114 Neb. 734). In the King of Trails Bridge Co. case, our Supreme Court held that, within the maximum toll rates fixed by the District Court as provided in Sec. 492, any bridge company could charge any toll down to no toll at all and no other bridge company could complain. Said the court:

> "That a minimum rate was not imposed in the act was doubtless a legislative recognition of **the unwritten law of competition which, ordinarily, favors the public at large.**"

Since the new, toll bridge company could not complain of another toll bridge company operating in the same locality and charging a toll of nothing, neither could it complain, in the absence of an authorized agreement, of the competition furnished by the free public bridge.

So the question now reverts to the original question: What authority do the state and counties have to give a toll bridge company an exclusive franchise to collect tolls for transit over the Platte river in the Louisville territory, either directly or indirectly by closing to public use the only, other free and public bridge in said territory? in the King of Trails Bridge Company case (114 Neb. 734, 739), our Supreme Court quotes with approval from Patterson v. Wollman, 5 N. Dak. 608, holding that "where the state itself does not conduct its own toll bridge traffic, all questions having to do with the terms on which the state shall grant special privileges to others in respect to toll bridge rates, and all other questions connected with the subject are absolutely with in the control of the legislature." We fail to find that the Nebraska

Legislature has ever provided for the granting by the state or counties of any special toll bridge privileges of any kind to anyone; although the Legislature has authorized the mayor and council of first-class cities to license and regulate toll bridges within or terminating in such cities (Sec. 4496). We are, therefore, led to conclude that the state and counties are without the authority to close the public use of the free. public bridge solely to force public use of the private toll bridge (See 9 Corpus Juris, 449, Note 28).

A question still remains as to the authority of the state and counties to discontinue the public use of state and county bridges for any or all reasons and purposes. For, if the state and counties have general authority to close their said bridges to public use, the fact that their closing incidentally benefits a private, toll bridge does not detract from their power to close the public bridge to public traffic.

As already stated, the legislature has granted to the state and counties the authority to provide both free and toll bridges by erection and purchase, and to provide for the maintenance and repair of same, and provide for the discharge of liabilities due to defects in bridges (Secs. 2714-2757; Secs. 8356-8363; Laws 1923, Ch. 156). But we fail to find any statute authorizing the state and counties permanently to close to public traffic any established and existing public bridge. From the power to provide and repair public bridges the power to close them while repairing them or replacing them with new public bridges is no doubt fairly and necessarily implied. But permanently to discontinue or vacate a public bridge as part of a public road is a quasi-judicial power which by statute can be exercised only after notice and hearing and with right of interested persons to appeal (Secs. 2578 to 2587, 2591, 2600). Outside of this straight, narrow and well-marked judicial path way for vacating a public bridge as part of a public road, there is in the state and counties no general, public bridge-closing authority, the exercise of which may incidentally benefit a private, toll bridge company.

We are, therefore, constrained to advise that in our opinion, the state and county commissioners cannot legally tear down, neglect, condemn or otherwise permanently close to the public the free public bridge over the Platte at Louisville, so that traffic will be forced to use the toll bridge. We concur with the eminent text writer in 9 Corpus Juris 449, Note 27, who says:

> "Such exclusive privileges are not, however, favored in law and will not be recognized or enforced by the courts unless clearly expressed."

Sincerely yours,

C. A. SORENSEN, Attorney General,

By CLIFFORD L. REIN, Assistant Attorney General.

BRIDGES—RIGHT OF COUNTY TO APPROPRIATE MONEY FOR ON STATE AND FEDERAL HIGHWAYS

December 3, 1930.

Mr. Julius D. Cronin,
County Attorney,
O'Neill, Nebraska.
Dear Sir:

You inquire:

"1. Can the county, from its general fund, road fund or bridge fund, appropriate a sum of money for the erection of a bridge on a designated state and federal highway?

"2. Can the county from its general fund or road fund appropriate a sum of money with which to buy right of way for a corner on a designated state and federal highway?

"It is proposed that this work be done on state and federal highway number 13 upon which the state and government have already done considerable road building. With respect to the bridge, it is proposed that the state and county shall each stand one-half of the cost thereof. The real estate desired is for the purpose of rounding out a corner on said highway."

I am of the opinion that the correct answer is "no" to both the questions you ask.

I base this opinion upon Section 8336, Compiled Statutes which is amended by Chapter 187, Laws of 1927, which reads as follows:

"On and after January 1, 1926, it shall be the duty of the department of public works to maintain the whole of the state highway system, including bridges thereon: Provided, that portions of such highways lying within incorporated cities and villages having a population of more than twenty-five hundred (2500) inhabitants shall be maintained solely by said city or village. In carrying out such work of maintenance, the department of public works is hereby authorized to enter into agreements with boards of county commissioners and county supervisors in counties which it may find to have an organization and equipment suitable for that purpose, or to employ such other methods or means as it may deem best for that purpose; provided, that if any county which may enter into any such agreement for maintaining the state highways therein shall fail to perform such maintenance work in accordance with said agreement and to the satisfaction of the department of public works, such department may cancel such agreement and adopt such other

means as it may deem best for the performance of such work."

I take it that the above is an implied inhibition upon the power of a county board to contract to use county money for the purpose of maintaining a state highway. I do not recall any express inhibition of such use.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

BARBERING—PRACTICE OF DEFINED

December 1, 1930.

Mr. Erland Nelson,
President, Dana College,
Blair, Nebraska.
Dear Sir:

Your letter of November 8 to the Board of Barber Examiner has been referred to this department for reply.

You say:

> "I understand that a number of young men have cut one another's hair on the campus but at no time has it included anyone who was not connected with the college."

The question is whether these young men are required to have barber licenses before cutting hair.

The Barber Act, Chap. 163, Laws 1927, as amended by Chap. 154, Laws 1929, requires every person, with certain exceptions not relevant to this question, who practices barbering to secure a license.

Section 2 of the act defines barbering to be:

> "Any one or any combination of the following practices (when done upon the upper part of the human body for cosmetic purposes and not for the treatment of disease or physical or mental ailments and when done for payment either directly or indirectly or without payment for the public generally), constitutes the practice of barbering.
>
> "Shaving or trimming the beard or cutting the hair.
>
> "Giving facial and scalp massages or treatments with oils, creams, lotions or other preparations either by hand or mechanical appliances. Singeing, shampooing or dyeing the hair or applying hair tonics. Applying cosmetic preparations, antisep-

tics, powders, oils, clays or lotions to scalp, face, neck or upper part of the body."

If the young men you mention are merely engaged in cutting the hair of their room mates or a few personal friends on the campus, and are not serving such a number of people as to indicate that they are serving the public generally, and if they receive no payment or remuneration of any kind either directly or indirectly for such services, I think they do not come within the definition of barbering and need not have a license.

If, however, they are cutting hair for such a large number, even though they may all be connected with the college, that it amounts to a general service to the public, or if they receive pay or remuneration of any kind for this service, I am of the opinion that they are practicing barbering and must secure a license.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

SCHOOL TAX—SPECIAL LEVY—DEFINED

April 4, 1930.

Mr. Hugo J. Buckendahl,
County Clerk,
Pierce, Nebraska.
Dear Sir:
Dear Sir:

You say:

"Please give me your opinion as to the following question on 'Special School Levy.'

"No. 1.

"School Dist. No. 20 with 7 mills general levy and 1 mill free high levy and School Dist. No. 36 with 4 mills general levy; 2 mills special building levy and 1 mill free high levy.

"John Jones' whose original district is No. 20 and transfers to district No. 36 for school purposes, must he pay the special levy of 2 mills in district No. 36 in addition to the 4 mill general and 1 mill free high levy; or example
"No. 2.

"John Doe's whose original district is No. 36 with the same levies as mentioned in example No. 1 and transfers to district

No. 20, is he excused from the payment of the special levy of 2 mills in district No. 36?

"Is there a difference for the special building fund and special levy for the general school levy fund."

There is a difference in my opinion between a special levy for the general school fund and a special levy for the school building fund. The first is merely an increased levy for general school purposes while the latter is a levy made for the special purpose of building a school house. Your other questions are answered, I think, by Section 6524, which was amended in 1929 and which provides among other things that:

"The county clerk shall be empowered and it is hereby made his duty to place the school taxes except for the payment of existing bonds or the interest on the same, of the parents or guardians and of the real estate on which they reside * * * in the adjoining district instead of in the district of their residence, basing such school taxation upon the levy for school purposes in the adjoining district."

You will note this includes both special building fund and free high school fund taxes.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

WAR VETERANS—EXEMPTION FROM POLL TAX

April 26, 1930.

Dr. L. D. Arnot,
Exeter, Nebraska.
Dear Sir:

In your kind letter of recent date you state and inquire "is there any law or ruling whereby a citizen who served in the World War and has an honorable discharge is exempt in this state from paying a poll tax * * *. Does the service in any war in the history of this country exempt one from paying a poll tax."

The law to which you refer is Laws of Nebraska 1925, Chapter 166, Page 434. This law after exempting from the payment of poll tax paupers, idiots and lunatics and persons fifty years of age or over provides as follows:

"A like exemption shall apply to honorably discharged veterans of the World War who are disabled or who are receiv-

ing disability compensation from the federal government and honorably discharged veterans of the Spanish American War."

It thus appears that honorably discharged veterans of the Spanish American War are exempt from the payment of poll tax simply on the basis of their honorable discharge. But the World War veteran to be exempt from poll tax must not only be honorably discharged but either disabled or receiving disability compensation from the United States government.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

GASOLINE TAX—NATURE OF AS REVENUE MEASURE

June 27, 1930.

Professor G. O. Virtue,
The University of Nebraska,
Lincoln, Nebraska.
Dear Professor Virtue:

Referring to your inquiries in your letters of May 30 and June 13 concerning the interpretation of the gasoline tax law as regards its nature as a revenue measure as distinguished from excises or license fees, the questions you raise are purely academic except where conditions arise dealing with the operation and effect of such laws on interstate commerce.

As you know, the federal government is in no way legally interested and has no control over questions of state taxation, except as such measures conflict with specific federal constitutional provisions. Whether, therefore, the gasoline tax proceeds are applied to highway construction and maintenance or are simply turned into the state treasury as a part of the general revenue of the state no federal constitutional question is raised unless such tax violates the commerce clause or the fourteenth amendment.

> "There is nothing in the federal constitution which requires a state to apply such fees for the benefit of those who pay them." Carley and Hamilton v. Snook, (1930) 50 S. Ct. 204, at page 206.

There seems to be no case in the Supreme Court of the United States pertaining to the express subject you mention as applied to gasoline taxes. The gasoline tax cases have primarily had to do with such taxes as violations of the commerce clause by reason of the move-

ment of the gas itself in interstate commerce. The leading cases in the Supreme Court are:

Helson and Randolph v. Kentucky, 279 U. S. 245

Bowman v. Continental Oil Co., 256 U. S. 642.

The questions you raise, however, have been considered in considerable detail by the Supreme Court cases involving state motor vehicle registration laws. The following are the principal cases along that line:

Hendrick v. Maryland, 235 U. S. 619, 35 S. Ct. 140.

Kane v. New Jersey, 242 U. S. 160, 37 S. Ct. 30.

Clark v. Poor, 274 U. S. 554, 47 S. Ct. 702.

Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502.

The Sprout case especially analyzes and defines excises, license fees and occupation taxes with reference to the construction and application of the commerce clause as applied to state registration fees. You will note that occupation taxes as defined by the court are always unconstitutional when levied on interstate commerce or on instruments of such commerce. This is due to the Supreme Court's definition of occupation tax as a purely revenue measure.

The court has built up its own definition of excises, license fees and occupation taxes and it is important to analyze these definitions to properly understand the various cases decided by the Supreme Court involving the several classifications.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

DEPENDENT CHILDREN—BOARD OF CONTROL MAY CONSENT TO ADOPTION

July 11, 1930.

Mrs. Nellie Benson,
Board of Control,
Lincoln, Nebraska.
Dear Mrs. Benson:

You left with me some correspondence with the acting county judge of Kearney County relative to the adoption of children who had been committed to the Home for Dependent Children. Sections 1564 to 1575, inclusive, Compiled Statutes of Nebraska for 1922, cover the subject of adoption of children. Any adoption to be legal must be

made in substantial compliance with these sections of the statutes.

Sections 6886 to 6890, inclusive, Compiled Statutes of Nebraska for 1922, relate to the power of the Board of Control over children committed to the care of the Home for Dependent Children. Section 6886 provides specifically that "The Board of Control is hereby made the legal guardian of all children now in the custody of the Home for Dependent Children and of those who shall be committed to its care * * * and it is hereby authorized to place them in such families for adoption * * *." Section 6888, provides that the agent of the Board of Control acting under the instructions of the board, is authorized to consent to the adoption of any child who has been committed to the Board of Control by the court acting under the juvenile court law, and that the order of committal shall be deemed to be authority for the Board of Control to consent to the adoption of any child committed to it. It appears from these sections of the statute that the Board of Control becomes the legal guardian of the children committed to its care by any court acting under the juvenile court law.

It is therefore our opinion that the Board of Control as guardian may relinquish the custody and control of any child committed to it, and consent to its adoption under the provisions of Section 1565. There should be filed with the county judge a certified copy of the commitment of the child to the Home for Dependent Children and a written consent and relinquishment of the child by the Board of Control.

The last line in Section 1570 providing for service upon the parents of the child to be adopted is probably applicable in our opinion, even where the child by operation of law has come under the charge and custody of the Board of Control and the Board of Control has become its guardian. It seems to have been the intent of the legislature to give the parents one last chance to make provision for caring for their child before they lose finally and forever all right of their own flesh and blood. In order therefore that an adoption be legal without any possible question, we believe that the provisions of Section 1570, as amended by Chapter 68, Laws of 1929, page 249, should be followed.

We are returning the correspondence.

Yours very truly,

C. A. SORENSEN, Attorney General.

ROAD TAX—APPORTIONMENT OF FUNDS

March 23, 1929.

Mr. Fred Wm. Deyke,
Columbus, Nebraska.
Dear Sir:

We have your letter of the 15th in which you state that your county board is apportioning the road dragging fund according to the valuation of the different towns, and you ask if this does not violate the provisions of Section 951, Compiled Statutes of Nebraska for 1922.

Section 951 as amended by Ch. 44, Session Laws for 1923, provides that "Each supervisor shall have special charge of the expenditure of money appropriated out of the county treasury by the board for roads, bridges and culverts within his district, except in city districts, when the board shall direct as to which one of the supervisors shall supervise the expenditure of money appropriated as aforesaid."

We do not believe that the apportionment of the dragging fund in the manner you indicate is a violation of this section of the statutes.

Section 2630 Compiled Statutes for 1922 provides:

> "One-half of all moneys collected as road tax shall constitute a county road fund which shall be divided equally between the several commissioner districts, to be expended for the general benefit of the roads of said district; the other half of all moneys collected as such road tax and all labor tax collected shall constitute a district road fund, to be expended under the control of the county board, **in the road district from which it was collected,** for the improvement and maintenance of the roads of such district, by the overseer of such road district under the direction of the commissioner in whose district such road district may be."

From the language of Section 2630 above quoted, it would appear that it was the intention of the Legislature to expend, as far as practicable, the taxes raised for care and maintenance of the roads within the road districts and precincts in which the taxes are raised. We do not believe that the practice followed by your board is a violation of the law.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

ROAD TAX—COUNTY FUNDS—HOW APPORTIONED

May 27, 1929.

Mr. D. G. McAllister,
Lincoln, Nebr.
Dear Sir:

You call my attention to the fact that Section 2630, Compiled Stat-

utes and Section 4148, Compiled Statutes differ with each other in this that Section 2630 provides that

> "The board may levy the same rate of road tax upon the property within the cities of the metropolitan class, cities of the first and second class and villages as is levied upon the property in the several road districts, and one-half of such tax when collected, shall go to the county road fund, the other half when collected, to be paid to the city or village where levied."

while Section 4148 provides:

> "All money arising from the levying of road tax against or upon property in said city shall belong to the city and shall be expended upon the streets and grades in such city."

You inquire which one of these statutes controls the disposition of county road funds raised by the taxation of property within the corporate limits of the city.

The correct answer to the question you ask is not altogether free from doubt. I am inclined to the opinion, however, that Section 2630 prevails insofar as county road tax levied by the county board is concerned.

Section 4148 which is a part of the charter of cities of the first class having from 5,000 to 25,000 inhabitants was passed in its present form as a part of an amendatory act which amended several other sections of the city charter. Inasmuch as it was passed with an emergency clause it took effect at once upon its approval which was March 15, 1907. The same session of the legislature which passed in its present form and as a part of an amendatory act amending numerous sections of the city charter of cities with from 5,000 to 25,000 also amended what is now Section 2630, Compiled Statutes and for the first time mentioned in said section cities of the first and second class and villages, and specifically provided that one-half of the road tax levied in such cities by the county board should go into the county road fund. This act was passed without an emergency clause and was approved April 10, 1907. It seems to me that the courts will probably hold that this was the latest expression of the legislative will and therefore prevails. Aside from this it is possible to construe the two sections so as to avoid a conflict by construing Section 4148 to apply alone to road taxes which are determined by the city authorities and Section 2630 to road taxes in which the rate of levy is fixed by the county board and the tax is levied upon all the tangible taxable property in the county.

Yours truly,

C. A. SORENSEN, Attorney General,

By GEORGE W. AYRES, Assistant Attorney General.

ROAD FUND—APPORTIONMENT—BETWEEN COUNTY AND DISTRICT

June 29, 1929.

Mr. T. J. Howard,
County Attorney,
Greeley, Nebraska.
Dear Sir:

In answer to your kind letter of June 26, 1929, permit us to say that, as we have hitherto construed Laws 1929, Chapter 180, Section 1, Pages 637-8, the equal division of the road fund between general county and road district expenditure, provided for in the second sentence of said Section 1, is subject to the limitation contained in the third sentence of said section, viz:

> "There shall be expended in each road district of the county such per cent of the total county road fund as the per cent which the county road mileage of each district bears to the total county road mileage of the county."

So long as the above rule of equality and conformity of road-fund expenditure among road districts of the county is substantially complied with, it is our opinion that on road work within each road district there may be expended one-half of the road money collected therein.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

INDUSTRIAL SCHOOL INMATES—HOW PAROLED

October 17, 1929.

Mr. N. T. Harmon,
Chief State Probation Officer,
Board of Pardons,
Lincoln, Nebraska.
Dear Sir:

You inquire whether inmates of the Boys' Industrial School at Kearney and the Girls' Industrial School at Geneva may be released on parole except by order of the Board of Pardons. By Section 13 of Article IV of the State Constitution, and Section 10233, Compiled Statutes of Nebraska for 1922, the Board of Pardons has exclusive jurisdiction to grant or deny pardons, paroles, commutations, reprieves and the remission of fines or forfeitures. Section 10233, Compiled Statutes of Nebraska for 1922 reads as follows:

> "The board of pardons shall have jurisdiction to grant or deny pardons, paroles, commutations, reprieves and the remission of fines or forfeitures. No person shall be released nor shall any fines or forfeitures be remitted under the guise of any other procedure or on the purport of any other document except such as are specifically prescribed in this act."

There are two classes of inmates in the Boys' Industrial School and in the Girls' Industrial School, first, those who have plead guilty or who have been convicted of some crime, and second, children found to be delinquent, dependent or neglected, but not charged with nor convicted of any particular crime.

In our opinion no person sent to either of these industrial schools who has plead guilty to or been convicted of a crime can lawfully be paroled except by the Board of Pardons.

As to the second class, it is our opinion that the Board of Pardons has no jurisdiction over the persons in that case. Section 7038, Compiled Statutes of Nebraska for 1922 states that the Superintendent of the Boys' Industrial School "by and with the advice and consent of the board," referring to the Board of Control, may adopt by-laws for the promotion, paroling, and final discharge of inmates. This law was passed in 1901, and in our opinion was superseded and repealed by implication by the constitutional amendment and later law quoted above insofar as persons convicted of any crime are concerned.

Respectfully yours,

C. A. SORENSEN, Attorney Geneal.

GAMBLING—DEFINED

April 5, 1929.

Rev. J. M. Etheredge,
Belden, Nebraska.
Dear Rev. Etheredge:

Your letter of March 26th at hand. Section 24 of Article 3 of the Constitution of Nebraska says:

> "The Legislature shall not authorize any games of chance, lottery, or gift enterprise under any pretense, or for any purpose whatever."

Section 9800, 9802, and 9803, Compiled Statutes of Nebraska for 1922, read as follows:

> "Whoever suffers any game or games whatsoever to be played for gain upon or by means of any gaming device or

machine of any denomination or name, in his, her or their house, or any outhouse, booth, arbor or erection, of which he, she or they have the care or possession, shall each pay a fine of not less than fifty nor more than two hundred dollars."

"Whoever shall play at any game whatever for any sum of money or other property of value, or shall bet any money or property upon any gaming table, bank or device, prohibited by law, or at or upon any other gambling device, or who shall bet upon any game played at or by means of any such gaming table or gambling device, shall, upon conviction, be fined in any sum not less than one hundred dollars, and not exceeding three hundred dollars, or be imprisoned in the penitentiary not more than one year; and upon a second or any subsequent conviction shall be fined in any sum not less than three hundred dollars and not exceeding five hundred dollars, or be imprisoned in the penitentiary not more than two years: Provided, if any person or persons shall lose any property or money in a gambling house or other place, either at cards or by means of any other gambling device or game of hazard of any kind, such person, the wife or guardian of such person, his heirs, legal representatives or creditors, shall have the right to recover the money or the amount thereof or the property or the value thereof, in a civil action, and may sue each or all persons participating in the game, and may join the keeper of the gambling house or other place in the same action, who shall be jointly and severally liable for any money or property lost in any game or through any gambling device of any kind; and no title shall pass to said property or money; and in any action to recover the same no evidence shall be required as to the specific kind or denomination of money, but only as to the amount so lost."

"Whoever shall set up or keep any gaming table, faro, bank, keno or any other kind of gambling table or gambling device or gaming machine of any kind or description, under any denomination or name whatsoever, adapted, devised and designed for the purpose of playing any game of chance for money or property, except billiard tables, or who shall keep any billiard tables for the purpose of betting or gambling, or shall allow the same to be used for such purpose, shall, upon conviction, be punished by a fine of not less than three hundred dollars, and not exceeding five hundred dollars, or be imprisoned in the penitentiary not exceeding two years."

This office is not trying to regulate private morals or to make people good by law. We are trying to prevent the young people of the

state from being polluted and exploited by professional gamblers who live by gambling.

In addition to laws on gambling, Nebraska also has strict laws on lottery enterprises. Section 9818, 9819, and 9821 read as follows:

> "Whoever opens, sets on foot, carries on, promotes, makes or draws, publicly or privately, any lottery or scheme of chance, of any kind or description, by whatever name, style or title the same may be denominated or known; or by such ways and means exposes or sets to sale any house or houses, lands or real estate, or any goods or chattels, cash or written evidences of debt, or certificates of claims or any thing or things of value whatever, shall be fined in any sum not exceeding five hundred dollars."

> "Whoever vends, sells, barters, or disposes of any lottery ticket or tickets, order or orders, device or devices of any kind, for or representing any number of shares, or any interest in any lottery, or scheme of chance, or opens or establishes as owner or otherwise any lottery or scheme of chance, in this state or is in any wise concerned in any lottery or scheme of chance, by acting as owner or agent in this state for or one behalf of any lottery or scheme of chance to be drawn, paid or carried on, either out of or within this state, shall be fined in any sum not exceeding five hundred dollars, or be imprisoned not exceeding six months, or both."

> "Whoever sells or offers or sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance or other place of amusement, with a promise, expressed or implied, to give or bestow, or in any manner hold out the promise or gift or bestowal of any article or thing, for and in consideration of the purchase of any other article or thing, whether the object shall be for individual gain, or for the benefit of any institution of whatever character, or for any purpose whatever, shall be held to be engaged in a gift enterprise which is hereby declared to be unlawful and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars, or imprisoned in the county jail not exceeding six months, or both."

When I took the oath of office, I took an oath to enforce the law. That I intend to do without fear or favor. The state must be made safe for our young people. To succeed in this effort I need the hearty

support of all citizens who believe in law enforcement and clean government.

Sincerely yours,

C. A. SORENSEN, Attorney General.

TAX SALES, REDEMPTION

November 12, 1929.

Mr. Allen G. Fisher,
Attorney-at-Law,
Chadron, Nebraska.
Dear Sir:

You make inquiry concerning the mandatory effect of the constitutional requirement for two years redemption from tax sales. You also inquire as to the statutory time for redemption in case of treasurer's administration sale and foreclosure sale. It is clear that under the requirements of Section 3, Article VIII of our constitution "owners and persons interested" in real estate sold for non-payment of taxes have a period of not less than two years in which to redeem from such sales.

It seems that under our existing laws the two year redemption period runs from the date of sale, whether administrative or in a foreclosure action rather than from the date of confirmation.

Section 6130, a part of the "Scavenger" act, Compiled Statutes of Nebraska for 1922, clearly makes the two years redemption period run from the date of sale under the decree of the court (see Parsons v. Prudential Real Estate Co., 86 Neb. 271).

Section 6086, Compiled Statutes of Nebraska for 1922, as amended by Chapter 105, Laws of Nebraska 1923, and also by Chapter 168, Laws of Nebraska 1925, and Section 6069, Compiled Statutes of Nebraska for 1922, as amended by Chapter 168, Laws of Nebraska 1925, provide for redemption after administrative sale without court procedure.

Section 6089, Compiled Statutes of Nebraska for 1922, as amended by Chapter 105, Laws of Nebraska 1923, provides for redemption after foreclosure by the holder of the tax sale certificate, the period of redemption running from the date of sale.

In this connection we believe that the holding in Bundy v. Wills, 88 Neb. 554, 130 N. W. 273 which followed Smith v. Carnahan, 83 Neb. 667, to the effect that the period of redemption runs from confirmation, is not the law under the present provisions of our statute.

Section 6087, Compiled Statutes of Nebraska for 1922, provides for

redemption from sale in foreclosure proceedings instituted by the county.

It would seem that the law contemplates that the issuance of a deed is the last step in foreclosing and terminating rights of redemption.

Yours very truly,

C. A. SORENSEN, Attorney General,

By L. R. NEWKIRK, Assistant Attorney General.

BARBER BOARD—REGULATIONS, SALE OF FOODS

May 17, 1929.

Mr. H. J. Brandt,
515 Court Street,
Beatrice, Nebraska.
Dear Sir:

You recently referred to this office a letter received by you from Mr. Henry J. Walker, Secretary of the Barber Board, dated May 10, 1929, in which he called your attention to Rule 9B of the Sanitary Rules of the Board governing barber shops which requires that there must be a partition of lath and plaster, glass or other solid material between the barber shop and any room where food is prepared or served. You ask whether this applies to pop and other soft drinks as well as to ice cream and foods generally.

It is our opinion that all foods and drinks are included. The courts have frequently defined food to include every article used as food or drink by man except water.

Under the Act the Barber Board has authority to make rules and regulations governing the sanitary conditions in barber shops and we believe that the rule which Mr. Walker refers to is reasonable and would be upheld by the courts. We believe, therefore, that you should not permit the sale of pop or other drinks of any kind or of candy, ice cream or any other article of food. We believe, however, that this would not apply to tobacco and chewing gum as these articles could hardly be called food under the definition.

Very truly yours,

C. A. SORENSEN, Attorney General,
By H. L. KYLE, Assistant Attorney General.

FISHING—NETS

July 12, 1929.

Mr. Lee A. Byers,
Dakota City, Nebraska.
Dear Sir:

This is in answer to the questions contained in your kind letter of July 6, 1929, relative to the use of nets for fishing in the Missouri River.

Except for minnow fishing with minnow nets, fishing with nets is unlawful in the State of Nebraska (Laws, 1929, Chapter 112, Article V, Section 2; Same, Article VI, Section 12). The State of Nebraska, so far as the force and application of its laws including fishing laws are concerned, extends eastward to the midde of the channel of the Missouri river. In case of doubt as to whether a particular act of fishing with nets is done on the Nebraska or Iowa side of the said boundary, the State of Nebraska may take jurisdiction of the offense and hold it to the exclusion of Iowa (Miller v. McLaughlin, 224 N. W. 18, March 12, 1929). It is, therefore, our opinion that there is no right to fish with nets except minnow fishing with minnow nets in the Missouri river west of the middle of the channel thereof; and if the fish are caught by net west of said middle of the channel of the Missouri river, it would not, in our opinion make any difference where, or how, or whether the throats or funnels of the nets were fastened.

There is nothing you can do about the nets the wardens took from you. The law makes unlawful the possession of all nets, except minnow nets, and makes no exception of nets in an incomplete state or condition. The law authorizes the wardens to seize and confiscate such nets except minnow nets. Hence, it would be a practical impossibility to make fish nets in this state, without possessing them in this state, and since possession of them is unlawful in this state, your only safety lies in being entirely without fish nets, except minnow nets, west of the middle of the channel of the Missouri river (See Laws, 1929, Chapter 112, Article VI, Section 12, Page 436).

It is therefore, our opinion that the advice of the wardens to go over in Iowa with the fish nets, except minnow nets, has the support of Nebraska law.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

FISHING AND HUNTING—RIPARIAN OWNERS—TRESPASS

September 29, 1930.

Mr. J. Cummins,
Hastings, Nebraska.
Dear Sir:

You ask:

"Does the owner of land adjoining the Platte River have any jurisdiction over the hunting privilege in the river? Can such owner sell or lease you the exclusive right to that river?

"If a hunter enter the river at a highway intersection or without trespassing upon any land other than that controlled by the state, may he construct a blind in or use one of the small islands or towheads for the purpose of hunting waterfowl, in season, without the permission of the landowners whose property adjoins the river?"

Section 10, Article V, Chapter 112, Laws of Nebraska for 1929 provides:

"It shall be unlawful for anyone to hunt or filsh upon any private lands, without permission of the owner."

The answers to the questions you ask depend upon whether the persons owning land adjoining the Platte river own merely to the bank or margin of the river or to the center of the stream.

The general rule regarding ownership of land adjoining non-navigable steams, as announced by our Supreme Court in the case of McBride v. Whitaker, 65 Neb. 137, 90 N. W. 966, is that grants of land bounded upon a river not navigable carry with them the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the bank or margin of the river.

It was also held by our Supreme Court in the case of Kinkead 1. Turgeon, 74 Neb. 580, 109 N. W. 744, that a riparian owner of lands on one side of a navigable river owns to the thread or center of the stream, subject to the public easement of navigation. See also Sioux City Bridge Co. v. Miller, 12 Fed. (2nd) 41.

The law is well established that the public has the right to hunt and fish on public lands and navigable waters and that, even in states like Nebraska, where the title to the bed of a navigable river is in the adjoining land owner the public has a right to hunt or fish upon the waters of the stream, 27 Corpus Juris 944, Sec. 7.

Islands, even in a navigable river like the Missouri, belong to the adjoining land owner under the rule announced by our state courts, and no one can go on such island to hunt or fish without consent of the owner. This would apply, of course, to islands in the Platte river, or any other stream in Nebraska, as well as the Missouri.

Any citizen of Nebraska, properly licensed, may hunt or fish from a boat in the Missouri river as long as the boat does not touch the shore, either of the mainland or an island, of land belonging to a private party, because the Missouri is a navigable river. Schermerhorn v. Dozier, 251 Fed. 839. No one has the right to hunt or fish, even from a boat, in a creek or river which is not navigable without having permission from the adjoining land owner. 27 C. J. 943, Sec. 5.

We have been unable to find, either in any reported decision of the courts, legislative enactment, or governmental report, that the Platte river has ever been specifically classified either as a navigable or a non-navigable river. In Clark v. Cambridge, etc. Co., 45 Neb. 798, it was specifically held by our Supreme Court that the Republican river is not navigable, and the rule was laid down that a navigable river must be one whose waters actually and in fact afford a channel for useful commerce. In McBride v. Whitaker, 65 Neb. 137, 90 N. W. 966, a case involving the right of ownership to an island in the Platte river located in Buffalo County, it was tacitly assumed by our Supreme Court that the Platte river is not a navigable stream, and it was held that adjoining land owners own to the center of the stream.

It was contended in McBride v. Whitaker, supra, that inasmuch as the government survey upon which the grants of land along the Platte river was based showed a mendear line along the bank of the river and not to the thread of the stream that the adjoining land owners only held title to the bank of the stream and had no control over any part of the stream itself or the island in the stream, but the court held that the mere fact that the government survey showed meander lines along the banks of the river and not in the center of the channel and that islands in the stream were left unsurveyed was no evidence that the title of the adjoining land owner stopped at the bank of the stream, and that, under numerous decisions of the U. S. Supreme Court, the adjoining land owner did in fact take title to the center of the stream and not merely to its bank unless the terms of the grant clearly showed the contrary. It would seem, therefore, almost conclusive that, should the question squarely arise in our supreme court it would hold that the Platte river is not a navigable stream and that adjoining land owners own to the center or thread of the main channel of the stream.

This being true, it follows that an owner of land along the Platte

river does have jurisdiction over hunting privileges on his side of the river; that he can sell or lease the exclusive right to hunt or fish on the river and islands to the thread of the stream and that no one has the right to hunt or fish there on an island or from a boat without his permission, even though the river was reached by a public road.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

ANTI-DISCRIMINATION LAWS—SALES OF MERCHANDISE

April 23, 1930.

Mr. F. W. Anderson,
Care Anderson Department Store,
Cozad, Nebraska.
Dear Sir:

In your letter of April 2 you state that a certain chain store is selling a two pound caddy of crackers for 32c in Cozad but sells the same amount of the same brand for 35c at Lexington. You also state that they are paying 25c per dozen for eggs in Cozad and only 20c at Lexington. You ask if such practices are a violation of the law.

Section 3432, Compiled Statutes of Nebraska, 1922, provides that any person, firm or company, association or corporation doing business in Nebraska and engaged in the production, manufacture or distribution of any commodity in general use, "that shall intentionally, for the purpose of destroying the business of a competitor in any locality," discriminate between different sections, communities or cities of this state by selling such commodity at a lower rate in one section, community or city, than is charged for said commodity by said party in another section, community or city, after making due allowance for the difference, if any, in the grade or quality and in the actual cost of transportation, etc., "shall be deemed guilty of unfair discrimination which is hereby prohibited and declared unlawful."

The same section likewise prohibits the paying of a higher price for any product or commodity at one locality than at another when done for the purpose of injuring or destroying the business of a competitor.

It can readily be seen that the difficulty in enforcing this law lies in proving the intent to destroy competition. If you can establish the facts stated in your letter by competent evidence, and also that the prices are fixed at Cozad by this company for the purpose of injuring

or destroying competition we believe that a prosecution could be successfully maintained.

We should be glad to receive further information from you and suggest also that you take the matter up with your county attorney.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

AUTOMOBILES—DRIVERS LICENSE—REVOCATION

January 31, 1930.

Mr. Emil F. Luckey,
County Attorney,
Columbus, Nebraska.
Dear Mr. Luckey:

This is in answer to your kind letter of January 30, 1930, requesting information as to whether it is mandatory upon a court to revoke the drivers license of one convicted in said court of operating a motor vehicle while under the influence of liquor.

The pertinent language in Laws 1929, Ch. 148, Sec. 12, reads as follows:

> "If the conviction shall be * * * for operating a motor vehicle while under the influence of liquor or narcotic drug, said license shall be revoked and a new license shall not be granted * * * within one year from the date of conviction for operating a motor vehicle under the influence of liquor or narcotic drug."

We fail to find that the Supreme Court has construed this language. Still it seems clear and unambiguous and is mandatory in form.

We are therefore of the opinion that it is mandatory upon the court to revoke such license.

With kind personal regards, we are

Sincerely yours,
C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

INTANGIBLE TAX—FOREIGN INSURANCE COMPANIES

November 15, 1929.

Messrs. Palmer & Palmer,
Omaha National Bank Bldg.,
Omaha, Nebraska.
Gentlemen:

In your letter of November 7, you ask our opinion as to the applica-

bility of the intangible tax law passed by the last legislature (Chapter 168, Laws 1929) to foreign insurance companies doing business in this state.

We are of the opinion that foreign insurance companies are taxed under the provisions of Section 5984, Compiled Statutes of Nebraska for 1922 and that the intangible tax law above mentioned does not apply to such insurance companies.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

STATE—SURETY BOND—COURT PROCEEDINGS

October 17, 1930.

United States Fidelity and Guaranty Co.,
Equitable Building,
Des Moines, Iowa.
Gentlemen:

* * * * *

In reply to your letter of October 13 concerning the above described bonds issued by your company, you are advised that the special session of the legislature which met in March, 1930, passed a law making it unnecessary for the state of Nebraska or any state officer, state board, state commission, head of any state department, agent or employee of the state or the secretary of the Department of Trade and Commerce as receiver of insolvent banks, or any receiver appointed on application of the state of Nebraska, to furnish bond for costs, appeal, supersedeas or attachment in any proceedings in which the state or any such officer, board, commission, head of department, etc., is a party litigant in its or his official capacity. This law was approved as an emergency measure effective March 17, 1930.

Consequently the Department of Public Works is not legally authorized to incur liability for premiums upon the above bonds after the effective date of said law.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

CENSUS—CHANGE IN POPULATION—EFFECT ON PUBLIC OFFICES

June 23, 1930.

Mr. S. A. Richardson,
Clerk of the District Court,
Butte, Nebraska.
Dear Sir:

You state that according to the 1930 census the population of Boyd County has decreased to less than 8,000. For the past thirty years Boyd County has had a clerk of the district court. Section 1904, Compiled Statutes of Nebraska, 1922 as amended by Chapter 103, Laws 1927, provides that in each county having a population of less than 8,000 inhabitants the county clerk shall be ex-officio clerk of the district court and perform the duties by law devolving upon that officer. You ask if the office of district clerk would still be maintained in Boyd County by reason of its having once been established even though the population of the county is fallen below 8,000 inhabitants.

It is our opinion that whenever the fact is satisfactorily established that the population of any county is less than 8,000 inhabitants he electors of the county should cease to elect a clerk of the district court and the duties of that officer devolve upon the county clerk even though the county may at one time have had a clerk of the district court. In other words, the fact that the office has once been established does not mean that it must be retained when the circumstances under which the legislature as said that such officer shall be elected no longer exist. It is well established by numerous decisions of our Supreme Court that the legislature may put any conditions or regulations upon any office which it may create. State v. Ure, 91 Neb. 31, 135 N. W. 224; State v. Houston, 94 Neb. 445, 143 N. W. 796, 50 L. R. A. N. S. We think, however, that a clerk of the district court after he has been elected for a four year term, is entitled to hold his office until the end of his term even though the population of the county may have fallen below 8,000 during his term of office.

In this connection we might add that in the case of Gordon v. Lowry, 116 Neb. 359, 217 N. W. 610, it was held that the population of a government subdivision of the state is not conclusively determined by the reports of the United States census. The census report is evidence of the population of a county but is not conclusive proof thereof. Should there be a question on this point it would be a matter to be tried and determined by the courts.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

CENSUS—CHANGE IN POPULATION—EFFECT ON PUPLIC OFFICES

June 26, 1930.

Mr. E. G. Reed,
County Attorney,
Kearney, Nebraska.
Dear Mr. Reed:

We have your letter of the 19th in which you state that the county board of Buffalo County in 1924, after taking evidence, passed a resolution finding the population of the county to be over 25,000, and have been paying salaries to public officials on that basis ever since. The 1930 federal census indicates that the population of Buffalo County is now about 24,500 but there are good grounds for the belief that the population will soon be over 25,000. You ask if the county board should make a new finding and determination of the population in view of the results of the federal census.

Our Supreme Court has frequently held that the reports of the federal census are merely evidentiary and in no way binding upon the courts or other fact-finding bodies of this state, the most recent holding to that effect being found in Gordon v. Lowry, 116 Neb. 359, 217 N. W. 610, mentioned in your letter.

Your county board is therefore not required, in our opinion, to hold another hearing and determine the population of the county merely because of the census report unless it believes that the evidence of a difference in the population from what it was in 1924 is so strong as to justify the belief that a different classification would probably result from such hearing. If it is reasonably certain that there is a temporary lowering of the population of the county which will be recovered within the next few months, we think it would hardly be worth while for the board to reconsider its former ruling. This, however, is a question for the board to decide.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

CITIES AND VILLAGES—SALE OF LIGHTING PLANT—APPLICATION OF FUNDS

January 8, 1930.

Hon. James Auten,
North Bend, Nebr.
Dear Sir:

In re question submitted to me for an opinion as to whether or not the City of North Bend may lawfully use the money derived from the sale of its lighting plant for the purpose of paying off intersection pav-

ing bonds issued by the city, I will say that in my opinion it may. In making this statement I assume the lighting plant is paid for so there remains no outstanding obligation of the city arising from that source.

I will add that if there is real estate belonging to the lighting plant, I am of the opinion it can only be sold when the sale is authorized by a vote of the electors (See Section 4252, Compiled Statutes for 1922).

In the recent case of Moore v. Central City, 224 N. W. 690, the supreme court held that the City of Central City when authorized by a vote of the electors of the city so to do could transfer the sum of $10,000.00 from an electric light fund to a general fund and thence to the city hall building fund. I think these cases are quite analogous. In fact it would seem that about as good use as a city could make of any money it has would be to use it to pay off debts which are a general obligation of the city as intersection paving bonds are.

I have not had time to investigate the other questions you submit to me and hence do not care to render any positive opinion thereon or to be dogmatic in the expression of my views. I may say that in a general way I believe the city authorities have a right to establish rates for public service utilities so long as those rates are not confiscatory.

Yours truly,

GEORGE W. AYRES, Assistant Attorney General.

CITIES AND VILLAGES—POLICE POWER—SUNDAY LAWS—COMPENSATION INSURANCE

July 11, 1930.

Mr. Clyde G. Haskins,
Village Clerk,
Stella, Nebraska:
Dear Sir:

In reply to your inquiry of July 5, 1930, concerning the authority of your village board to enact Sunday closing laws pertaining to mercantile businesses, it is our opinion that under the provisions of Section 4229, Compiled Statutes of Nebraska, 1922, the village board has such authority. This section gives the board power to pass ordinances to maintain, "the peace, good government and welfare of the town or village, and its trade, commerce and manufactories, and to enforce all ordinances by inflicting penalties upon inhabitants or other persons, for the violation thereof, not exceeding one hundred dollars for any one offense, recoverable with costs, together with judgment of imprisonment until the amount of said judgment and costs shall be paid."

In the case of State v. Somberg, 113 Neb. 761, our Supreme Court sustained such an ordinance passed by the city council of the city of Omaha under the provisions of a section similar in wording to the above section.

In answer to your second inquiry concerning the collection of compensation insurance carried by the village on its voluntary firemen, you are advised that if the insurance company refuses to pay compensation according to its policy a claim should be filed by the fireman against the village and insurance carrier with the Compensation Commissioner.

It seems most strange that in such a case the carrier refuses to pay the liability. Both the village and the carrier may be subjected to the penalties provided in the compensation law for failure to pay in the times required under the compensation law. Claims blanks can be procured from the office of the Labor Commissioner, Capitol Building, Lincoln, Nebraska.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

BANKS—DEPOSITS OF CITY FUNDS—LIABILITY OF CITY TREASURER

December 20, 1929.

Mr. W. R. Metz,
Attorney at Law,
Alliance, Nebr.
Dear Sir:

In answer to the questions you suggest, I will say the law does not provide for an investment of the current funds of a city such as Alliance in any securities and it limits deposits in banks to deposits in banks located in the county and further limits the deposit that is permitted in any bank to a sum not in excess of twenty per cent of the capital stock of that bank and not more than one-half the amount of the bond furnished by the bank to secure such deposits.

Section 4151, Compiled Statutes, contains among other things the following provision:

> "The city treasurer shall not be liable for any loss sustained by reason of the failure of any such bonded depository whose bond shall have been duly approved by the mayor as herein provided."

It is possible, although the law does not say so, that a city treas-

urer would be held liable for an excess deposit made in a bank even though such excess deposit is secured by a bond that has been approved by the mayor. I am inclined to the opinion, however, that in such a case the question of whether he is personally liable or not will depend upon whether when everything is considered he used good judgment and exercised due care in making the deposit. In any event he will have nothing to fear I think if the amount of the deposit does not exceed the amount of the bond given to secure it and that bond is absolutely good. In other words, I do not believe the surety on the bond will be received of liability up to the amount of the bond by reason of the fact the amount of the deposit may exceed that permitted by statute.

The situation is analogous, I think to that which arose in the case of State v. People's State Bank of Anselmo, 198 N. W. 1018, in which it was held that:

> "Where a county treasurer deposits public funds in a state bank in excess of 50 per cent of the paidup capital stock of said bank, the entire deposit is within the protection of the depositors' guaranty fund."

Respectfully submitted,

C. A. SORENSEN, Attorney General,
By GEORE W. AYRES, Assistant Attorney General.

BASIC SCIENCE LAW—RECIPROCITY

January 28, 1929.

H. J. Lehnhoff, M. D.,
Stuart Building,
Lincoln, Nebraska.
Dear Sir:

You ask:

1. Bearing in mind the basic science law, is Nebraska permitted to reciprocate lawfully with other states that do not have a basic science law?

2. Where the two are in conflict, which has precedence, the provisions of the general medical practice act or the provisions of the basic science law?

I will endeavor to answer the above questions in the order in which they are asked.

1. Sections 89 of Chapter 167, Session Laws of 1927 (General medical practice act) provides that the Department of Public Welfare may, without examination, except where a practical examination is required,

license persons to practice the healing arts upon certain conditions, one of those being that the state or territory from which the applicant comes shall have and maintain standards regulating his profession equal to those maintained in that profession by Nebraska.

This act does not provide that the applicant shall have a certificate of ability in what are designated as the basic sciences but the so-called "Basic Science Act" provides that no one shall be granted such a license unless he has presented to the Department of Public Welfare, a certificate of ability in certain designated subjects which are classed in that act as The Basic Sciences, (See Section 1 of Chapter 164, Session Laws of 1927).

The board of examiners in the basic sciences may waive the examination usually required when proof satisfactory to it has been submitted showing that the applicant has passed examination in the Basic Sciences, either before a board of examiners in the Basic Sciences in another state or territory, or before a board authorized to issue licenses to practice the healing arts in another state when the requirements of that state are in the opinion of the board not less than the requirements in this state (See Section 8 of Chapter 164, Session Laws of 1927).

You will observe that it is possible to admit an applicant to practice by the harmonious action of the Basic Science Board and of the Board of Medical Examiners even though the state or territory from which the applicant comes does not have a basic science law.

2. Where the provisions of the Basic Science Law and of the "Uniform Licensure Act" are in conflict, the latter prevail for the Basic Science Law was approved April 18, 1927, while the "Uniform Licensure Act" was not approved until April 25, 1927, and the general rule is in the case of an absolute conflict between the provisions of two separate and independent acts passed at the same session of the Legislature the provisions of the act last approved prevail.

The provisions of the two acts should be harmonized however, where it is possible to do so. It would not be a bad idea to have the situation clarified during the present session of the Legislature.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General

TOWNSHIPS—VILLAGES—DISTRIBUTION OF FUNDS BETWEEN

July 26, 1929.

Mr. E. J. Meyer,
Bancroft, Nebraska.
Dear Sir:

You inquire as to the proper division of funds between your township and your village included in the township. Careful investigation has failed to reveal to us any law requiring the proceeds of any township tax to be divided with any political subdivision within the township. Laws, 1929, Chapter 180, Page 637, provides for the equal division of county road funds raised within cities or villages between the county and the city or village. But we fail to find any law requiring a township to divide any part of its funds with a village therein, or requiring a village to divide any part of its funds with the township it happens to be in.

Section 910, Compiled Statutes of Nebraska, 1922, gives the electors present at the annual township meeting the right to levy taxes for purposes required by law including payment of the necessary meeting and election expense. The township should not do its meeting and election work on the charity of the village but should levy a tax and pay its part of this expense. This ought not to be a great hardship on the township for it appears from your letter that both bridge and road work by the township are now virtually obsolete.

In conclusion permit us to say again that there is no law requiring division of funds between township and village and vice versa.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

INTOXICATING LIQUOR—USE IN MANUFACTURING—BAKING

December 19, 1929.

Hon. George H. Wark, Prohibition Administrator,
U. S. Prohibition Service,
Treasury Department,
Topeka, Kansas.
Dear Mr. Wark:

Re: Legal.

This is in answer to your letter of December 4, 1929, requesting opinion as to whether brandy, rum and similar liquors for use in a baking process in the making of cakes whereby the beverage quality of

the intoxicating liquor is destroyed, may be legally possessed and transported in the state of Nebraska.

Section 3260, Compiled Statutes of Nebraska, 1922, as amended by Session Laws of Nebraska, Chapter 155, Pages 539-540, authorizes the use of such liquors in such baking process in the following language:

> "Nothing in this section shall be construed to prohibit the use of extracts or liquods of alcoholic content commonly used in the manufacture of food products, wherein in the process of manufacture the alcoholic content of such foods is rendered unfit for use as a beverage."

There is not in said amended section any language expressly or by necessary implication making lawful the possession and transportation of liquors for said authorized uses.

It is further noted that Section 3247, Compiled Statutes of Nebraska, 1922, as amended by Session Laws of Nebraska, Chapter 94, Page 239, is still in force and effect. This law prohibits the possession of any intoxicating liquor except a reasonable amount for the possessor's personal use kept in his private dwelling house. This law also makes the possession of any intoxicating liquor, even in the possessor's private dwelling house, prima facie evidence of unlawful possession. In McLaughlin v. State, 104 Neb. 392, 171 N. W. 744, the Nebraska Supreme Court speaking through Morrissey, C. J., restricted the right to possess liquor in one's dwelling to such liquor as was obtained prior to the taking effect of the Nebraska Prohibition law—May 1, 1917. In said decision, the pertinent language reads as follows:

> "The right to keep a reasonable quantity of intoxicating liquors in one's private dwelling house for personal use, provided for in Sec. 11, Ch. 187, Laws, 1917, does not imply any lawful means for obtaining possession of liquor after such act went into effect."

Section 3248, Compiled Statutes of Nebraska, 1922, prohibiting the transportation of any intoxicating liquors, with exceptions not material to the present inquiry, also remains and continues in full force and effect.

It is thus apparent that existing Nebraska laws prohibit in this state the possession and transportation of "any intoxicating liquor"; a broad phrase plainly indicating such intoxicating liquor as is authorized to be used in the baking process under discussion. In view of the established rule that statutes **in pari materia**,—i. e. relating to the same subject-matter, must be construed together and full force given to all provisions of the related laws, (State v. Opela, 108 Neb. 821, 189 N. W. 157), it is difficult to see how intoxicating liquor may be lawfully transported and possessed for lawful use in the baking process. It may be

contended that the authority to use the intoxicants in the baking process implies the authority to transport and possess the same for such authorized use. But this contention is adversely disposed of by Section 3290, Compiled Statutes of Nebraska, 1922, providing:

> "The legislature hereby declares this act to be for the immediate preservation of the public peace, health and safety, and all its provisions shall be liberally construed for that purpose." (Janesovsky v. Rathman, 107 Neb. 165, 185 N. W. 411).

The transportation and possession of any intoxicating liquor, including such as is authorized in the baking process, is, therefore, unlawful and actionable in Nebraska. The possession of the same is prima facie evidence of guilt and the possessor has the burden of establishing acquisition before May 1, 1917. We are, therefore, constrained to the view that it is unlawful to transport and possess in Nebraska brandy, rum and similar liquors for use in a baking process in the making of cakes whereby the beverage quality of the intoxicating liquor is destroyed.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

INTOXICATING LIQUOR—"TONICS," SALE OF

July 2, 1929.

Mr. W. A. Everton,
Crofton, Nebraska.
Dear Sir:

We have your letter of June 6th, in which you state that certain druggists are selling Malt Tonic containing 2 per cent alcohol, over their counters. You ask if this is lawful.

In our opinion the sale of Malt Tonic, or any liquor containing more than one-half of one per cent alcohol for use as a beverage is a violation of law.

It is our opinion that Malt Tonic can only be sold lawfully for use as a tonic or medicine, and this would ordinarily require that it be sold only in the original bottle and only in such amounts as are reasonably necessary for the use of purchasers as medicine. When a purchaser buys several bottles at a time it is pretty good evidence that he is not using the tonic for medicinal purposes but rather as a beverage, and it is the duty of the druggist to guard against this as much as possible.

Chapter 155, Session Laws 1929, which will become effective on the

25th of this month, is an act relating to the alcoholic contents of drugs, medicine, extracts and foods. It provides among other things that such products used as medicine or remedies must contain drugs in sufficient quantities to make them medicinal preparations and to render them unfit for use as a beverage. It also provides that none of these articles shall be sold or kept for sale, or in the possession of any person in bowling alleys, pool halls, places of amusements or soft drink parlors. The act goes on to provide as follows:

> "Every person who shall sell or give away any patent or proprietary medicine, medical compounds, and preparations, remedies, perfumes, essences, extracts, or syrups, which contain sufficient alcohol to be used for purposes of intoxication, knowing or having a reasonable ground to believe that such patent or proprietary medicine, compounds, preparations, remedies, perfumes, essences, extracts, or syrups, being purchased for use as a beverage, shall be deemed guilty of a violation of the provisions of this chapter.
>
> "Every druggist or other person, who shall sell or give away proprietary medicines which contain sufficient alcohol to produce intoxication, shall be required to register in a book kept for that purpose the name and address of the person obtaining the same, the date of the sale and the quantity sold or given away; which register shall be kept open to the inspection at all times, during business hours, to the governor, county attorney of the county or any other peace officer. Failure to make proper entries therein, shall constitute a violation of this Act." (Page 540, Session Laws, 1929).

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

WORKMEN'S COMPENSATION LAW—CHIROPRACTOR'S FEES

October 2, 1929.

Dr. Floyd Lange, D. C.,
968½ G Street,
Geneva, Nebraska.
Dear Sir:

You inquire:

> "Is not a chiropractor entitled to compensation under the State Compensation Law for services rendered to an injured workman?"

While our Supreme Court has not yet passed upon the question of whether chiropractic services are "medical services," for which the employer is liable in compensation cases, our opinion is that a chiropractor would be entitled to recover of the employer in all cases where a practitioner of medicine properly so called would be entitled to recover. The reason is that both chiropractors and doctors are licensed and permitted by law to charge for their services.

But this does not wholly dispose of your question. Under Section 3043, Compiled Statutes, 1922, as construed in Radil v. Morris & Co., 103 Neb. 84, where the employee refuses to allow the employer to furnish him medical services, the employer is generally not liable for such services. The only exceptions are emergency casses where the employee must call medical aid without waiting to apply to the employer; and other cases, where the person selected by the employer to give such medical services would not satisfy a reasonable man under like circumstances.

Under this rule, if the employer offers his injured employee the medical services of a competent, regular practitioner of medicine, and the employee refuses his services and calls a chiropractor, or any other licensed person than the person selected by the employer, it seems to us that the employer and his insurance carrier would not be liable for the medical services of the person thus selected by the employee.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

COUNTIES—RECORDS, AUDIT OF

June 13, 1930.

Mr. W. W. Fought,
Oshkosh, Nebr.
Dear Mr. Fought:

Your letter of June 10th at hand in which you ask if the county board can be compelled to have the books of the county offices audited.

I am sorry to say that there is no law by which that can be done. Bills have frequently been introduced in the legislature to make it compulsory on the part of county boards to have the books of all county offices audited at least every five years. These bills so far have always been defeated. As the matter now stands the county board is only responsible to the voters for their action in such matters.

Sincerely yours,

C. A. SORENSEN, Attorney General.

COUNTIES—OFFICERS—RESIDENCE

March 10, 1930.

Mr. J. C. Paxton,
Seneca, Nebraska.
Dear Sir:

In your letter of February 6, 1930, you ask if your county is compelled to have a county attorney and a county judge, and also whether or not, if you must have such officers, they are required to be from your own county.

Section 1907, Compiled Statutes of Nebraska, 1922, as amended by Chapter 82, Laws of 1925, provides that in each county there shall be elected every fourth year one county judge and one county attorney. We find no laws authorizing any county to dispense with either of these officers and are of the opinion that such officers must be elected.

As to whether such officers must be elected from the county, there seems to be no statute or constitutional provision which actually requires that a county officer shall be a resident of the county in which he is elected.

However in the case of State v. McMillen, 23 Neb. 385, 36 N. W. 587, our Supreme Court held as follows:

> "It is assumed to be the law—the construction to be given to the constitution and statutes—though not expressed literally, that a necessary qualification of an incumbent of an elective office is that of an elector; that as the highest authority rests wholly with the electors, the delegated authority was intended to be conferred only on electors; that if it was intended to impart political rights and official privileges to aliens, strangers, and non-residents, this intention would have been expressed clearly and not left to be gathered from general words, or from incidents which do not imply it."

Section 1893, Compiled Statutes of Nebraska, 1922, provides that "no person shall be qualified to vote at any election unless such person shall have resided in the state six months, in the county forty days and in the precinct, township, or ward ten days, and shall be a citizen of the United States."

Under the rule in State v. McMillen, supra, a non-resident of a county, not being a legal voter in the county, is not eligible to hold an elective office of the county. Our Supreme Court came dangerously near to overruling the McMillan case in State v. Quible, 86 Neb. 417, 125 N. W. 620, but it followed the McMillen case in State v. Wait, 95 Neb. 806,

145 N. W. 1049; in State v. Moores, 52 Neb. 770; and in State v. Boyd, 31 Neb. 682. We believe that if the proposition were put squarely before our Supreme Court it would hold as in State v. McMillen, supra, that only a qualified elector in the county is eligible to hold an elective county office.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

GASOLINE TAX—DISTRIBUTION BY COUNTY

December 16, 1929.

Mr. L. M. Childs,
County Commissioner
Harrison, Nebraska.
Dear Sir:

This is in answer to your kind letter of December 9, 1929, requesting information as to whether the gasoline tax proceeds received by the county should be equally divided between commissioner districts or pro rated according to auto licenses issued for each district.

Session Laws, 1929, Chapter 166, Sec. 2, Page 574, places the gasoline tax proceeds received by the county into the County Road Fund. Session Laws, 1929, Chapter 180, Sec. 1, Page 637, provides for the equal division of one-half the county road fund among commissioner districts, the other half to be expended in the road district wherein it is collected.

Since gasoline tax money when received cannot be identified as collected from any particular road district, it should, in our opinion, be placed in that part of the county road fund which is equally divided among the commissioner districts of the county. It is only in distributing gasoline tax proceeds to the counties that pro rating according to auto licenses issued in the county is applied. (Laws 1929, Ch. 166, Sec. 2, Page 574).

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

WARRANTS—IRRIGATION DISTRICTS—ORDER OF PAYMENT

December 13, 1929.

Mr. C. G. Perry,
County Attorney,
Bridgeport, Nebraska.
Dear Sir:

You say:

> "An irrigation district still has some outstanding registered warrants drawn on the 1927 levy. Collections for this year have been slow. The treasurer now has some money from the 1928 levy, and wants to know whether it is permissible to pay these warrants out of the money raised from the 1928 levy, or whether she must wait until she collects in enough money from the 1927 levy to pay 1927 registered warrants."

The correct answer to the question asked by the county treasurer may not be entirely free from doubt but I am inclined to the opinion that as a matter of strict law the holder of a warrant drawn against the 1927 levy is not entitled to payment out of the 1928 levy until all claims payable out of the levy for the later year have been paid. Section 2876, Compiled Statutes, 1922, provides that:

> "In case of due and outstanding obligations against the district contracted prior to the year in which any levy is made, the district board shall have power to make additional levy, not to exceed two mills on the dollar, assessed valuation, to create a special fund for the payment of past due obligations: Provided, further, whenever the claims or obligations against any fund for any year are fully paid, the board shall have the power to transfer any unused balance to any fund for any preceding or succeeding year."

This seems to me to imply that money raised by a levy of taxes to take care of the expenses for a certain year can only be used to defray the expenses incurred for a prior year after the expenses incurred during the year for which the levy was made have been paid.

It was held, however, in the case of State ex rel. Hagberg v. The County Commissioners of Furnas County, 10 Neb. 361, that the relator was entitled to be paid out of the levy made in 1880 for services rendered in 1879.

Similarly it was held in the case of State v. Gardner, 79 Neb. 101, that the general fund of a school district is a continuing fund upon which orders may be issued and paid in the order of their registration

upon the accumulation of money in the fund upon which they are drawn.

Respectfully submitted,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

DIVISION OF TOWNSHIP—EFFECT OF FUNDS

March 28, 1929.

Mr. E. G. Reed,
County Attorney,
Kearney, Nebraska.
Dear Sir:

This is in answer to your kind letter of March 23, 1929, requesting information as to whether in case of the division of a township there is also a legal division of township property and funds between the old and the new township.

In the absence of statute, such as applies to the division of counties (832, Compiled Statutes of Nebraska, 1922) the situation is governed by the common law rule that the property as well as the liabilities belong exclusively to the old township (15 Corpus Juris, 407, Note 97).

We are, therefore, of the opinion that you have correctly advised that the new township has no right to the property or funds of the old.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

PUBLIC OFFICERS—HOLDING TWO OFFICES

May 16, 1929.

Senator A. L. Neumann,
Oakland, Nebraska.
Dear Senator Neumann:

Your letter of May 15th at hand. Under the law a person can hold two elective offices at the same time if there is no conflict between the duties of the two offices. For example, frequently it happens that a member of the legislature is at the same time mayor of some city. Judge Thompson of the Supreme Court is also a member of the Capitol Commission. Harry Landis of Seward was for several years a member of the Board of Regents of the University and at the same time a Judge of the District Court.

While I personally doubt the advisability of one man holding two

offices, yet in the opinion of this office the city appropriation ordinance and the tax levy of your city are not illegal because signed by the man who holds both offices.

Very truly yours,

C. A. SORENSEN, Attorney General.

LIQUOR CASES—RIGHT TO JURY TRIAL

June 7, 1929.

Mr. A. G. Caldwell,
County Attorney,
Red Cloud, Nebr.
Dear Sir:

Your letter of June 5 at hand with reference to the right of a trial by a jury in liquor cases under the provisions of Section 3287, Compiled Statutes of Nebraska for 1922. This office has held that the defendant does not have a constitutional right to have a trial by a jury in liquor cases where the penalty does not exceed the fine of $100 or imprisonment of a period not to exceed three months. In our opinion, and such is the practice in a large number of counties, under the provisions of Section 3287 the magistrate may proceed to try a liquor case without a jury where the penalty does not exceed the one refrred to.

Should you have occasion to defend the constitutionality of this section at any time we will be glad to furnish you with a brief on the subject.

Sincerely yours,

C. A. SORENSEN, Attorney General.

COUNTY ATTORNEY—LIABILITY FOR MALICIOUS PROSECUTION

June 27, 1929.

Hon. E G. Caldwell,
County Attorney,
Red Cloud, Nebraska.
Dear Sir:

This is in response to your request for an opinion, supported by authority, on the immunity, if any, of county attorneys from suits for damages for malicious prosecution of informations and complaints, including search-warrant complaints in liquor and other cases.

Malicious prosecution is the procurement, investigation or continuance of a criminal prosecution maliciously and without probable cause.

38 Corpus Juris, 383, Note 3.

Huchler v. Miller, 79 Neb. 209, 114 N. W. 274 (3).

"An action for maliciously putting the law in motion lies in all cases where there is a concurrence of the following elements: (1) The commencement or continuance of an original criminal or civil proceeding; (2) Its legal causation by the present defendant against plaintiff who was defendant in the original proceeding; (3) Its bona fide termination in favor of the present plaintiff; (4) The absence of probable cause for such proceeding; (5) The presence of malice therein; (6) Damage conforming to legal standards resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action."

38 Corpus Juris, 387, Notes 70 and 71.

Casebeer v. Rice, 18 Neb. 210, 24 N. W. 693.

Dreyfus v. Aul, 29 Neb. 197, 45 N. W. 282.

C. B. & Q. R. Co. v. Kriski, 30 Neb. 229, 46 N. W. 520.

Hagelund v. Murphy, 54 Neb. 545, 74 N. W. 956.

McHugh v. Ridgell, 105 Neb. 212, 100 N. W. 75.

We are unable to find any case wherein the liability of county attorneys for malicious prosecution has been decided by the Nebraska Supreme Court. However, the Supreme Court has recognized the liability for malicious prosecution of peace officers including constables, justices of the peace and fire commissioners where they act maliciously, wantonly, without probable cause, in bad faith and from impure motives; the question of the character of their act being one of fact for the jury under proper instructions.

Vennum v. Huston, 38 Neb. 293, 58 N. W. 970.

McHugh v. Ridgell, 105 Neb. 212, 180 N. W. 75.

It is a universal rule that prosecuting attorneys are judicial or quasi judicial officers. (18 Corpus Juris, 1296, Notes 5 and 6). The Nebraska Supreme Court's recognition of this rule is found in Flege v. State, 93 Neb. 610, 142 N. W. 276, in the following language: "not only this court but all courts have so clearly stated the judicial duties of a public prosecutor as to leave no room for doubt as to the active impartial attitude of a prosecutor."

See also Lower v. State, 106 Neb. 666, 184 N. W. 174.

It is also the rule in Nebraska that if an officer exercising discre-

tionary powers, keeps within his power, his motives, however corrupt and malicious they may be, may not be made a reason for holding him liable for the damages caused by his acts.

46 Corpus Juris, 1044, Note 11.

DeBolt v. McBrien, 96 Neb. 237, 147 N. W. 462.

In Nebraska the remedy for the corrupt, willful or malicious performance of judicial acts by officers seems to be removal as provided by statute and, of course, poliitcal redress.

State v. Hastings, 37 Neb. 96, 55 N. W. 774.

In foreign jurisdictions authorities are divided as to the county attorney's damage liability for tortious exercise of official powers. The general rule, however, is that "a prosecuting attorney, being a judicial officer of the state is not liable in damages for acts done in the course of his duty although willful, malicious or libelous." As applied to the prosecuting attorney's malicious prosecution liability, the majority rule is that "A prosecuting attorney is not liable in an action for malicious prosecution instituted with malice and without probable cause."

18 Corpus Juris, 1318, Note 40.

Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001.

Farar v. Steele, 31 La. Ann. 640.

Parker v. Huntington, 2 Gray (Mass.) 124.

Ostman v. Bruers, 141 Mo. A. 240, 124 S. W. 1059.

38 Corpus Juris, 456, Note 42.

Smith v. Parman, 101 Kan. 115, 165 P. 663.

*Yaselli v. Goff, 8 Fed. (2nd Ed.) 161.

*Kittler v. Kelsch, N. D., 216 N. W. 898.

Watts v. Gerking, 111 Ore. 641, 222 P. 318.

To the contrary of the above rules, there is, however, considerable authority as follows:

San Diego v. Utt, 173 Cal. 554, 160 P. 657.

Arnold v. Hibble, 18 Ky. L. 947, 385 S. W. 1041.

Leong Yau v. Garden, 23 Hawaii 362.

Carpenter v. Libbey, 153 Cal. 213, 94 P. 879.

In support of the majority rule of non-liability or immunity Yaselli

v. Goff, 8 Fed. (2nd Series) 161, and Kittler v. Kelsch, N. D., 216 N. W. 898, are recent exhaustive and well reasoned cases. In Yaselli v. Goff, the court holds an assistant United States attorney general not liable for malicious prosecution. In giving reasons for this holding, the court quotes 137 Am. St. Rep. 50 as follows:

> "But the question is pretty well settled that a quasi judicial officer acting in a judicial capacity, with jurisdiction, is protected in the discharge of his duties to the same extent as judges, and that, while acting within the bounds of his authority, the fact that he acts maliciously or corruptly will not affect is right of immunity from civil liability."
>
> Faucett v. Dole, 67 N. H. 168, 299, 693.
>
> East River Gas Co. v. Donelly, 93 N. Y. 557.
>
> Gaines v. Newbrough, 12 Tex. Civ. App. 466, 34 S. W. 1048.
>
> First Universal Church v. Leach, 35 Vt. 108.

Kittler v. Kelsch, 216 N. W. 898, N. D., decided November 25, 1927, flatly holds on demurrer that the state's attorney, acting within his powers, is not liable for malicious prosecution. The reason assigned for this holding is that the state's attorney in criminal matters acts judiciously and is not liable in a civil action for a judicial mistake. The opinion sets out the North Dakota statutes relative to states' attorneys, and from these statutes, it appears that the state's attorney in North Dakota has practically the same discretionary power in connection with the commencement and continuance of criminal prosecutions as the county attorney in Nebraska. The opinion also contains an exhaustive review of all the authorities and distinguishes or discounts nearly all, if not all, the contrary holdings. The court demonstrates quite conclusively that the public interest requires the prosecuting attorney's immunity from suits for malicious prosecution; he must be free and fearless to act in the discharge of his official duties.

The implication in Vennum v. Huston, 38 Neb. 293, 56 N. W. 570, that justices of the peace may be civilly liable in damages for a malicious bind-over, is perhaps to be explained on the ground that in good faith complaints the state is absolutely entitled to a bind-over; so much so that if one justice does not grant it, other justices will be appealed to until the same is granted. In this respect the court seems to regard the justice of the peace as possessed of but little discretion; and is only ministerially required to refrain from a malicious bind-over.

While the question is not free from doubt, we are inclined to the opinion that in commencing and continuing criminal prosecutions of all

kinds, the county attorney, so long as he acts well within his statutory powers and jurisdiction, is immune from actions for malicious prosecution; and that any such actions against him will in all probability result in the direction of verdict or judgment in his favor.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

COUNTY SURVEYORS—LOST CORNERS—DUTIES

June 13, 1929.

Mr. C. D. Hayden,
County Surveyor,
Curtis, Nebraska.
Dear Sir:

We have your letter of the 7th regarding the destruction of monuments of land surveys by reason of road grading activities. You ask if you have authority to "hunt up" the corners that are being endangered, or if you must wait until the county board authorizes you to restore such corners.

House Roll 357, passed by the 1929 Legislature, makes it the duty of the county surveyor to perpetuate existing corners of land surveys along the public highways where such corners are liable to destruction. The act goes on to say: "It is not intended, however, that the surveyor shall restore any lost corner under this law unless so ordered by the county board in regular session." The act also makes it the duty of the Department of Public Works, the highway commissioners and every road overseer to notify the county surveyor where work is to be done that may cause the destruction of any corners of land surveys.

It is our opinion that, under this law, you are not required to hunt up corners that are likely to be destroyed but are only required to restore those corners which are destroyed when ordered to do so by the county board in regular session. The purpose of the law is apparently to avoid incurring expenses for the restoration of lost corners by the county surveyor unless authorized by the county board. You could, however, although you are not required to do so by law, call the attention of the board to any corners which have been destroyed or are likely to be destroyed, so that the board may act upon the matter and give you the necessary authority to proceed to restore such corners. This, we believe, is as far as you may properly go in the matter without authority from the county board, and if the board then refuses to act, it is up to the proper authorities to invoke the aid of the courts to compel the board to perform its duties.

House Roll 357 is now in effect, having been passed as an emergency act.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

TEACHERS—DISCHARGE BECAUSE OF MARRIAGE

April 15, 1929.

Mr. L. R. Mingo,
Editorial Department,
State Journal,
Lincoln, Nebraska.
Dear Sir:

Recently you asked this department to give an opinion as to the right of school boards to bar married women from teaching for no other reason than that they are married.

A school board has the legal right to refuse to hire a person as teacher for any reason whatever, or for no reason at all. The board may decline to hire an applicant because it objects to the color of his hair, the style of collar he wears, his politics, his nationality, the kind of car he drives, or any other objection, real or fancied which it may have to him. It undoubtedly has the right to refuse to hire a teacher because he or she is married. School boards are entitled to the same freedom to contract with whomever they please as are all other citizens.

Having entered into a contract to hire a teacher for a given length of time, however, it seems equally clear that a school board cannot dismiss the teacher because he or she is married, or marries during the term of the contract, where the contract contains no provisions giving the board power to dismiss for that cause. It is true that certain early decisions of the courts hold to the contrary, but they were in states where the common law disabilities governing married women still prevailed. At common law a single woman of lawful age was her own master and could lawfully contract to render services to whomever she chose. When she married, however, her services ceased to be her she chose. When she married, however, her services ceased to be her that when a woman voluntarily assumed a relation which gave to another the legal right to dispose of her time and services she could not complain if the school board chose to cancel the contract which she herself could no longer fulfill except by the consent of her husband. In Nebraska, however, the legislature long ago placed married women on an equality with men in respect to the power to contract, and the reasoning of these earlier cases does not apply. This is true in probably every

state of the union today, and recent decisions hold, almost without exexception, that the marriage of a woman teacher during the term of the contract is not a ground for abrogating the contract where the contract or the regulations of the school board contain no provision giving the board such authority.

In cases where the contract, or the by-laws or rules of the school board, specifically provide that marriage of the teacher shall authorize her dismissal by the board, a really difficult question is presented. Ordinarily persons may put into their contracts any terms or provisions they may see fit, however fanciful or silly they may appear to be to an outsider. It is a well-established rule, however, that a provision of a contract which is contrary to public policy will not be enforced by the couts. It is also a well established rule that any contract which has for its object the discouragement or prevention of marriage is against public policy and therefore void. This rule has been modified somewhat under certain circumstances, but it stands as the general rule.

By reason of this rule the tendency of the courts in recent cases has been to hold that provisions in teachers' contracts or in by-laws of the school board authorizing the board to dismiss the teacher in case she marries during the school term are invalid and cannot be enforced.

Ruling Case Law (Vol. 24, page 619), makes the following statement of the law:

> "A rule of a school board providing for the dismissal of a female teacher in case of marriage has been held capricious and unreasonable, and therefore invalid, where the statute provides for dismissal for cause only."

The statutes of Nebraska nowhere give to school boards authority to dismiss teachers because they marry, and it is my opinion that any attempt of the school board to give to itself such authority by contract or otherwise is invalid and that the marriage of a teacher does not, in and of itself, under any circumstances give the school board a legal right to dismiss her.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

INTANGIBLE TAX—TAXATION OF CAR WHEN PURCHASE MONEY ALREADY TAXED

June 24, 1929.

Mr. Frank L. Scovill,
124½ West Third Street,
Grand Island, Nebraska.
Dear Sir:

If you purchased the automobile which you now have on April 6, 1929, with money which you had on deposit in a bank April 1, 1929, and which you have returned for taxation as intangible property, I am of the opinion that your automobile is not subject to taxation this year (See Section 5923, Compiled Statutes of Nebraska, 1922).

Yours truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

LEGISLATURE—RULES—CONSTITUTIONAL PROVISIONS

January 17, 1929.

Hon. Trenmore Cone,
House of Representatives,
Lincoln, Nebr.
Dear Sir:

You state in your letter that the rules of the House have been changed so that the assent of five members is necessary to secure a roll call and to enter the same on the Journal. You refer to Section 11 of Article III of the Nebraska Constitution.

This section reads in part, as follows:

> "Each House shall keep a journal of the proceedings and publish them (except such parts as may require secrecy) and the yeas and nays of the members on any question, shall at the desire of any two of them be entered on the Journal. All votes in either House shall be viva voce."

The language is plain and explicit. No interpretation is necessary. Two members have the right to call for the yeas and nays on any question before the House. However, although the provision is mandatory, there is no power that can compel the Legislature to take affirmative action to make its rules comply with the Constitution. The action of the House under the constitutional provision depends solely on its own volition guided by its own sense of public duty and responsibility. It is assumed that the House of Representatives has the same desire to fol-

low the provisions of the Constitution as any other branch of the government.

Very truly yours,

C. A. SORENSEN, Attorney General.

CODE SECRETARIES—STATUS AS PUBLIC OFFICIALS

October 5, 1929.

Hon. L. B. Johnson,
State Auditor,
Lincoln, Nebraska.
Dear Sir:

In reply to your inquiry of September 21, 1929, concerning the legality of the recent increase in the salaries of the Secretary of the Department of Trade and Commerce and of the Secretary of the Department of Public Works, under the provisions of House Roll No. 425, Laws of Nebraska, 1929, Page 210, we are of the opinion that the Secretaries mentioned are not "the heads of such other executive departments as may be established by law" and therefore, do not hold offices created by the constitution within the meaning of Section 1, Article 4 of the Constitution of Nebraska; and that, consequently, such officers are not contemplated in the inhibition of Section 19, Article 3 of the Constitution of Nebraska, providing that

> "* * * nor shall the compensation of any public officer, including any officer whose compensation is fixed by the legislature subsequent to the adoption hereof be increased or diminished during his term of office."

In County of Douglas v. Timme, 32 Neb. 272, 49 N. W. 266, it was held:

> "In the absence of any constitutional prohibition or affirmative provision, fixing the term of office of any officer or his compensation, the legislature may change such term or compensation, and such change of term or compensation will apply as well to the officers then in office as to those to be thereafter elected."

The court in that case distinctly held that only in the case of an office created by the constitution there can be no increase in compensation of the officer during his term of office.

The civil administrative code in which the offices of various secretaries of the present code departments were created, went into effect prior to the adoption of our present constitution. At the time of the

adoption of the civil code it was constitutionally impossible to create "heads of other executive departments" as state officers. Having this in mind the legislature distinctly made all code secretaries agents of the governor in the administration of his duties as chief executive of the state.

Section 7242, Compiled Statutes of Nebraska for 1922, originally adopted in 1919, provides:

> "For the purpose of aiding the governor in the execution and administration of the laws the executive and administrative work shall be divided into the several departments enumerated in Section 2 (7243) of this article."

Section 8500, Compiled Statutes of Nebraska for 1922, as originally enacted provided that the words "department," or "Department of Finance," "Department of Agriculture," "Department of Labor," "Department of Trade and Commerce," "Department of Public Welfare" or "Department of Public Works," **"shall be construed to mean the governor of the state."**

Clearly, therefore, the legislature, by adopting the administrative code and providing therein for the offices of the various heads of departments, simply classified the administration of state affairs under the authority of the governor, defining in a definite manner the duties of the various agents acting under and for him in the execution of the duties of his office.

In no sense can the provisions of the constitution of 1920 be considered as a re-enactment of the provisions of the administrative code especially as regards the creation of the offices of the several department secretaries, nor can it be seriously contended that such secretaries could have been elevated to state offices simply by the addition of the words "and the heads of other executive departments as may be established by law" following the listing of state officers in Section 1 of Article 4 of the Constitution of 1920.

Therefore, the secretaries of the various code departments occupy the same legal position and status created and established by the civil administrative code as first enacted and are not officers created by the constitution as above outlined.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

COUNTIES—MAXIMUM TAX LEVY PERMITTED

December 31, 1929.

Mr. Harry W. Scott,
Tax Commissioner,
State House,
Lincoln, Nebraska.
Dear Sir:

You inquire as to the maximum levy of taxes by counties in this state. The answer to this question is found primarily in Chapter 181, Laws of Nebraska, 1929, being an amendment of Section 5979, Compiled Statutes of Nebraska, 1922, as amended by Chapter 176, Laws of Nebraska, 1927. This statute provides that in counties having a population of over 3500 the rate of tax shall not exceed thirty-five cents per one hundred dollars actual valuation, and in counties having a population, and in counties having a population of 3500 or less the rate of tax shall not exceed fifty cents per one hundred dollars actual valuation. Although there is some doubt in our minds, we are of the opinion that under the provisions of Sections 2753 and 2754, Compiled Statutes of Nebraska, 1922, the County Board may, beyond the limits above mention, levy a tax not to exceed one-fifth of one mill as a "special emergency bridge levy." At the time this emergency bridge measure was passed in 1909 the wording of the maximum tax provisions of our statutes was quite similar in form to the present wording in their reference to "county purposes." Inasmuch as the wording of the emergency bridge measure seems to indicate that the legislature contemplated a levy separate and apart from the general county levy, we cannot fairly construe the limitations in the latest enactment of the legislature, being Chapter 181, Laws of Nebraska, 1929, above mentioned as effecting by implication a repeal of the emergency bridge law.

Under the provisions of Section 5910, Compiled Statutes of Nebraska, 1922, as construed by our Supreme Court in Drew v. Mumford, 114 Neb. 100, the one mill levy authorized for emergency bridge purposes is automatically reduced to one-fifth of one mill. The original emergency bridge measure was passed when the assessed valuation of taxable property was 20% of the actual value.

By Chapter 133, Laws of 1921, the then authorized maximum levies were automatically reduced to one-fifth of the maximum limitations theretofore provided. This was necessary to prevent an automatic increase in revenue when the assessed valuation was changed from 20% of the actual value to the actual value of taxable property.

The absolute maximum of taxes which may be levied by the county, unless authorized by an election is fixed in Section 5, Article VIII of

the Nebraska Constitution at fifty cents per one hundred dollars actual valuation. The practical effect of this constitutional limitation is to limit in any event county levies for all purposes including judgments against the county for which judgments the county authorities may be compelled to levy taxes beyond the statutory limit but within the constitutional limitation.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

FRANCHISES—TAXATION OF

July 30, 1929.

Governor Arthur J. Weaver,
State House,
Lincoln, Nebraska.
Dear Governor Weaver:

In response to your inquiries as to the taxation of franchises permit me to summarize what we have already said partly in writing and partly verbally as follows:

Section 1 of Article VIII of the Constitution of Nebraska provides that "taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises."

In obedience to this constitutional provision the Legislature in 1921 passed a law providing for the taxation of the franchise value of companies "engaged in street railways, waterworks, electric lights, gas works, natural gas, mining, express, telegraph, telephone business in the State of Nebraska, and all other like companies and like associations, or owning or operating a pipe line in the State of Nebraska, whether such line is used for the transmission of oil, heat, steam or any substance to be used for lighting, heating, power or other purpose, or for the transmission of articles by pneumatic or other power."

The term "franchise" as relating to corporations may be defined as consisting of at least three parts:

1. The right granted by the state to individuals to form and be a corporation.

2. The right to exercise ordinary corporate functions.

3. The right to exercise special privileges of a public nature which properly and in the first instance belonged to the royal prerogative, such as the right to use the public streets and highways, to condemn land, to conduct a quasi-public business and to charge fixed rates for the service rendered.

It apparently was not the intention of the Legislature to tax the right granted by the state to individuals to form and be a corporation, nor the right to exercise ordinary corporate functions; for the Legislature only provided for the taxation of such associations and corporations as had secured from the state the right to use the public streets and highways, to conduct a quasi-public business, etc. It follows, therefore, that in seeking to tax the franchise value of these corporations your board should only seek to fix a value on the right of these companies to exercise such special privileges as has been given them by law. The value which you are seeking to reach for the purpose of taxation is the right to do and transact express telegraph, telephone, electric light and power, pipe line, waterworks, gas, and similar business within the state and, according to the decision of the Supreme Court of Nebraska in Western Union Telegraph Company v. City of Omaha, 103 N. W. 84, "it is immaterial whether this right is derived by virtue of an act of Congress, an act of the Legislature, or by the ordinances of a municipal corporation. The thing which is sought to be reached is the intangible right to transact business by means of the usual, visible, and tangible agencies with which the operations of public business are carried on, independent of the value of the instrumentalities themselves."

12 Ruling Case Law, page 185, has the following to say with reference to the value of franchises:

> "Generally franchises are an asset of great value to utility companies, and a principal basis for credit. A franchise, however, cannot be said to have a market value; and when its value is necessary to be proven, resort must be had to the nearest relative facts and circumstances from which such value may be fairly inferred. The franchise or bare right to do a thing considered with reference to itself alone is of no value. It is only when it is considered relatively and in connection with its use that it can be said to be valuable. To determine its value, the practical uses to which it can be put must be taken under consideration, or the profit which by proper management can be made out of it. Where a franchise is without value, and of such character as to render both an expenditure of money and the application of business judgment and skill in its management necessary to make it useful and profitable, its value must be determined by a consideration of it in connection with such possibilities."

The separate pieces of tangible property and the money and bills receivable of the public service corporations have been assessed for taxation by the local assessors. But obviously the value placed on this property is not the real value of the property of the company. The

difference between this value of the visible property and the actual valuation of the company although intangible in form is property that has value, produces income, and is the basis for credit at any bank. It is a cardinal rule which should never be forgotten that whatever property is worth for the purpose of credit, sale, or income, no matter what its form, it is also worth for the purpose of taxation.

In fixing the franchise value of companies, Sections 5890 and 5891, Compiled Statutes of Nebraska for 1922 provides that the Board of Equalization shall take into account the amount of capital stock authorized, the amount of capital stock paid up, the market or actual value of the shares of stock, the true value of any permit or license if any, granted under and by virtue of any law or ordinance, the length of time such permit or license was granted, the total amount of indebtedness except the indebtedness for current expenses, excluding from expenses the amount paid for the purchase or improvement of property, the amount of capital on which a dividend was declared during the preceding year, the date, rate and total amount of dividend declared, the net and gross earnings of the company, the amount of surplus and the amount of profit added to the sinking fund, and the average, minimum, and maximum prices for which shares of stock of the company sold during the previous year.

In the case of the Western Union Telegraph Company v. City of Omaha, referred to above, the Supreme Court said that "if the rule or manner prescribed by the Legislature is reasonably fair and just in its operation, and is measurably proper, and fairly well adapted to the attainment to the end required, it will not be interfered with, since the exactness is well nigh unattainable in such matters." In that same case the Supreme Court held that the gross receipts was not a reasonable measure of the value of the franchise of the company, the court saying that the value of franchise depends in a large measure upon the matter of profit and loss. "If the business is conducted at a large profit, its value is enhanced. If at actual cost or at a loss, it is practically of no value. In the case of telegraph, telephone, and express companies, the profits of the business and consequently the value of the franchise, depends very largely upon the rates which they are authorized to charge for the service performed." Good will and capitalized earning capacity may also be considered as an element in determining the value of a corporate franchise.

In the Nebraska case quoted from the Supreme Court held that the fact that the franchise value of the Western Union Telegraph Company was partly derived by an act of Congress, did not bar the state from taxing that value. The franchise value from whatever source derived is subject to taxation.

There has been some question as to whether or not franchises should

be taxed since public service corporations are not permitted to capitalize the franchise value for rate making purposes. So far as that goes the franchise value as a matter of fact is probably now reflected in the valuation of most public utility companies for rate making purposes. The reason why a franchise value should not be a basis for rates is because the franchise is a gift from the state and the people should not be taxed on their gift, every rate being in fact a tax. Of course, the taxes paid would add to the operating expenses of the company and the company having a right to a fair rate on its valuation after payment of all operating expenses, the taxing of the franchise value to that extent would tend to slightly increase rates but not very much. If, for example, we value the franchise of a certain public service corporation at $10,000.00 which compelled the company to pay additional taxes of $250,00, the company could not ask for increased rates that would yield 8% on $10,000.00 but could only ask for an increase in rates to yield $250.00. In Consolidated Gas Company of New York v. Newton, 267 Fed. 231, 240, the court said:

> "That the franchise has a kind of value is, of course, true enough; it alone protects the tangibles from becoming junk, but as a part of the 'rate base' it should never figure."

It appears that only the Western Union Telegraph Company and the Express Company have paid a franchise tax since the enactment of the franchise tax law in 1921. There are probably more than a hundred other companies subject to a tax on their franchise. In some cases the value of franchise may be nearly nominal, and in other cases the value of franchise may run into hundreds of thousands of dollars or even into millions.

The Northwestern Bell Telephone Company is only assessed on the basis of eleven million dollars but in its report to the State Railway Commission, fixes the book value of its property at twenty-one million dollars. The actual value of the property is probably several million dollars more. The Nebraska Power Company is assessed on the basis of approximately thirteen million dollars although the actual value of its property is somewhere between twenty-two million dollars and thirty million dollars. The same variance exists as to a large number of other public service corporations.

Even assuming that the assessment was made on a 75% basis, it is obvious that the franchise value of these companies amounts to several million dollars which have escaped taxation all these years. It is the opinion of this office that the State Board of Equalization has the authority and the duty to fix a franchise value of these companies and to cause the franchise value to be assessed on the same basis as tangible property. Of course where the variation between the assessed value

and the actual value is beyond reason, your board should cause a reassessment to be made of the tangible property of the company in addition to determining the franchise value.

Respectfully submitted,

C. A. SORENSEN, Attorney General.

ELECTIONS—VACANCIES IN LEGISLATURE—POWER OF GOVERNOR

February 13, 1930.

Hon. Arthur J. Weaver,
Governor,
Lincoln, Nebraska.
Dear Governor Weaver:

You state that you are contemplating calling a special session of the legislature and you inquire whether you have authority to fill the vacancies which have occurred in the membership of the legislature since the last general election.

Section 2246, Compiled Statutes of Nebraska for 1922 on this subject reads in part as follows:

> "When a vacancy occurs in the office of representative in congress, or members of the legislature, and the body in which such vacancy exists will convene prior to the next general election, the governor shall order a special election to fill such vacancy at the earliest practicable time, and ten days' notice of such election shall be given: PROVIDED, any vacancy occurring in either house of the legislature during a regular or special session thereof shall be filled by the governor within five days after said vacanry occurs by appointment of some qualified person of the same political affiliation as the previous incumbent from the district in which the vacancy has arisen. * * *"

The only question of interpretation is whether the state legislature "will convene prior to the next general election." It may be argued that this section relates only to the constitutional mandatory convening of the regular session which will not be prior to the next general election. In view of your announcement, however, it appears that prior to the next general election the legislature in fact "will convene." Since the validity of much important legislation enacted at this special session may depend on the validity of a few votes, we deem it the safer course to advise you to call special elections to fill the existing vacancies. The whole theory of our government is that the people shall elect the members of the law-making body and any law giving the governor the right

to appoint members of the legislature must be construed strictly against such power on his part and liberally in favor of the ancient right of the people to choose their law-makers.

Ten days notice of each special election must be given. (Sec. 2246, Compiled Statutes for 1922).

The county board of canvassers must meet the third day after the special election to canvass the votes and the next day the county clerk must transmit to the secretary of state an abstract of the votes cast if there be more than one county in the district. (Sec. 2250, Compiled Statutes for 1922). Within ten days after the special election the board of state canvassers must meet and canvass the votes to fill the vacancy. If when they meet the returns have not come in from the counties, the board may adjourn to such day as may be necessary, not exceeding five, to receive the returns. (Section 2251, Compiled Statutes for 1922).

In order to allow the statutory time for the notice of the special election to be given and time for the receiving of the returns, it would appear that in order to be safe from twenty to twenty-five days should elapse from the time of notice of special elections to the time of convening of the legislature in special session.

As to the nomination of candidates for office to be filled by special election Section 2123, Compiled Statutes for 1922 provides:

> "All nominations for candidates of any political party for office to be filled at a special election or any other office to be filled by the electors, excepted from the provisions of this article, shall be nominated by a convention or committee of their political party, which nomination shall be in writing, shall contain the name of the office for which each person was nominated, the name and residence of each person, and if in a city, the street, number of residence, and place of business, if any, and shall designate in not more than five words, the party which said convention or committee represents. It shall be signed by a presiding officer and the secretary of such convention or committee, who shall add to their signatures their respective places of business and take an oath before a qualified officer to administer the same, that the affiants were such officers at such convention or committee, and that said certificate, and the statements therein contained, are true to the best of their knowledge and belief. * * *"

This of course is not a matter concerning which you have any duty to perform. The various political parties may or may not as they choose nominate candidates. It might be well for you to notify the respective chairmen of the various political parties of your intention

to call a special election in certain legislative districts, and thus give them an opportunity to take steps to have their respective parties nominate candidates.

Where the legislative district only embraces one county it would appear that the county committee of each party would have the right to nominate the candidate of their party for the office to be filled. The situation as to senatorial district is somewhat different because so far as I know there are no senatorial district party committees. If I were asked about the matter I would suggest that the chairman of each political party call together the county committees in the senatorial districts and have them organize as a senatorial district committee.

Very truly yours,

C A. SORENSEN, Attorney General.

ELECTIONS—FILING FOR OFFICE, TIME FOR

July 7, 1930.

Hon. George W. Norris,
United States Senate,
Washington, D. C.
Dear Sir:

You inquire as to the legality of the filing for United States Senator of an alleged George W. Norris of Broken Bow.

We went to the office of the Secretary of State and Mr. Thomas, Deputy Secretary of State, showed me the filing receivd from Norris No. 2 and the envelope in which the filing was mailed. There is a post mark on the envelope indicating that it was mailed from Broken Bow July 2, 1930, and reached the Lincoln post office July 3, 1930. According to Mr. Thomas, however, the envelope with the filing was not delivered to the Secretary of State until about 10 o'clock Saturday morning, July 5, 1930. Mr. Thomas acting for Mr. Marsh, Secretary of State, marked the filing of Norris No. 2 as received "July 5, 1930."

It has been the custom of the Secretary of State for many years to accept such filings as of the date they were mailed, and Mr. Marsh has indicated that he intends to do so in this case. Mr. Marsh in so doing will be following the custom of that office for many years, and in fairness to him it should be said that he is not making that ruling for the special purpose of helping Norris No. 2.

However, in our opinion the filing of Norris No. 2 is not valid. It seems to us that to mark the statement of Norris No. 2 as having been filed on July 3, 1930, would be a falsification of the records of the office of Secretary of State. A person desiring to file any document with the

Secretary of State must at his own risk choose the means of getting the document to the office of the Secretary of State. If he selects a messenger who fails to deliver it within the proper time that is not a fault of the state official but is the hard luck of the person who selected the messenger. When Norris No. 2 put his affidavit of filing in an envelope and put on the envelope the necessary stamps and put the envelope in the post office at Broken Bow he made the post office his agent in the delivery of the document. The failure of that agent to deliver the document on July 3 is not different from the failure of any other agent to perform a contract. In Nebraska a motion for new trial has to be filed within three days. If I mail a motion for a new trial to the Clerk of the District Court in some county in western Nebraska and it fails to actually reach his custody within that three day period I am out even though the post office mark on the envelope showed that it reached the city in which the clerk resides within the three day period. The authorities are unanimous on this subject so far as I have been able to ascertain.

The Supreme Court of Nebraska in O'Brien v. Schneider, 88 Neb. 479, 128 N. W. 1002, said:

> "A document is filed with an officer when it is placed in his custody and deposited by him in the place where his official records and papers are usually kept."

In State v. Piper, 50 Neb. 40, 69 N. W. 383, the Supreme Court of Nebraska said that the statute requiring objections to be filed within three days after filing of certificate of nomination with the Secretary of State was mandatory. The Supreme Court reaffirmed this same doctrine in State v. Amsberry, 104 Neb. 550, 178 N. W. 176. Other cases holding that the law relating to the time of filing of certificates of nomination are mandatory are Cramton v. Secretary of State (Mich.) 107 N. W. 875, State v. Falley (N. D.) 83 N. W. 913, and Walton v. Olson (N. D.) 170 N. W. 107.

On the question of whether or not mailing a document is a filing thereof there are many other decisions. State ex rel O'Hearn v. Erickson (Minn.) 188 N. W. 736 is squarely in point. It is what we lawyers call a "cow" case. O'Hearn mailed his affidavit of candidacy for Representative to Erickson, County Auditor, on May 10, 1922, the last day for filing but the affidavit was not received at the Auditor's office until the following day. The Auditor refused to accept the filing and O'Hearn brought an action in the name of the state to require the placing of his name on the election ballot. The court sustained the Auditor in rejecting the affidavit of filing, saying in part:

"Gen. St. 1913, Sec. 339, providing for the filing of an affidavit initiatory of a candidacy for office at the primary election, and requiring the affidavit to be filed at least 40 days before the date of the election is mandatory and an affidavit filed after the expiration of the period is ineffectual for any purpose.

"The situation is not changed or the delay cured by reason of the fact that the affidavit was deposited in the United States post office within the period, where it does not in fact reach the proper office until after the time has expired."

O'Hearn in this case had contended that as in Nebraska it had been the custom for many years to accept such filings where it appeared that they had been mailed on a day when the filing could be accepted. As to that contention the Supreme Court of Minnesota said:

"But it is contended that the statute has been given a construction and application by officers charged with its enforcement which renders the filing on the 11th valid; that such officers had frequently accepted and acted upon such filings coming through the mail therefore that there is in that a practical construction the statute, which should be followed and applied. The contention is not sound. The language of the statute is plain and unambiguous, definitely requires the affidavit to be filed 'at least forty days before the election, and there is no room for construction, practical or otherwise, at variance with its clear terms. 3 Dunnell's Dig. 8938. The practice of the election officers in heretofore accepting such filings cannot abrogate the specific requirements of the statute and constitute no valid precedent, and cannot be given the effect contended for by petitioner. 9 Ruling Case Law, 1087. The statute is mandatory. Seawell v. Gifford, 22 Idaho 295, 125 Pac. 182, Ann. Cas. 1914A, note 1136."

A number of other cases listed in Words and Phrases, Third Volume 3 under the word FILE and the subdivision DELIVERY BY MAIL are also squarely in point. We quote from a few of these cases as summarized on Pages 598 and 599 of said Volume 3:

"The term 'filed' as used in subdivision 1 of Section 4360, requires that the paper sought to be filed must be deposited with or placed in the custody of the officer whose duty it is to receive it, and is not complied with by depositing such paper in the post office addressed to the officer. Pendrey v. Brennan, 169 P. 174, 175, 31 Idaho 54.

"As Act March 3, 1891, c. 551, Sec. 7, 26 Stat. 1085 (8 USCA

Sec. 101; 10 USCA Sec. 875 note) as amended by Act March 2, 1895, c. 177; 28 Stat. 780 (8 USCA Sec. 103) fixes the office of the Commissioner of Immigration at Washington, D. C., the offense of failing to file with such Commissioner the statement required to be filed by Act June 25, 1910, Sec. 6, was committed at Washington, D. C., and the District Court for the Western District of Washington had no jurisdiction of a prosecution therefor, since the word 'file' means to deliver to the office, **and mailing the statement is not a filing thereof; a paper being filed when it is delivered to the proper official and by him received and filed.** United States v. Lombardo, (D. C. Wash.) 228 F. 980, 982.

"The filing of a document is not complete until it is received by the proper officer, evidence that it was properly mailed to him, not being evidence that it was filed; and the word 'file' as used in Ky. St. Sec. 571, requiring corporations to file certain statements in the office of the Secretary of State means their actual delivery in the office of the Secretary of State to some one authorized to receive them. Commonwealth v. O'Bryan Utley & Co., 155 S. W. 1126, 1128, 153 Ky. 406.

"Under Workmen's Compensation Act, pt. 2, Sec. 23, as amended by St. 1912, c. 517, Sec. 5, requiring notice of claim to be 'filed' with the Industrial Accident Board, a mere mailing of claim or an ineffectual attempt to put the claim in the custody of the board is not sufficient; for the word 'filed', in this connection, imports that the claim is to be placed permanently on the files of the board, so that any person interested may refer to it, and the paper on which the claim, with the details set forth in the statute, is written, actually must be delivered physically into the possession of the board before it can be said to be filed with the board. In re Gorski, 116 N. E. 811, 812, 227 Mass 456."

The statute requires a protest must be filed with the Secretary of State within ten days. If the person protesting is dissatisfied with the decision of the Secretary of State he may appeal to the court.

Very truly yours,

C. A. SORENSEN, Attorney General.

TELEPHONES—CITY POWERS

March 1, 1930.

Mr. Hugh Drake, Sec'y.
Nebraska State Railway Commission,
Lincoln, Nebr.
Dear Sir:

The letter of Mr. D. E. McGregor, under date of February 27th, 1930, addressed to you, as to the power of a city council to prescribe telephone rates, has been given attention.

In this state the regulation of telephone companies, including the fixing of their rates and charges, is under the jurisdiction of the Railway Commission. This is by virtue of Section 20, of Article Four, of the Constitution, and Section 5483, Compiled Statutes of Nebraska for 1922, defining common carriers. City councils do not have authority to prescribe rates for telephone companies.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HUGH LAMASTER, Assistant Attorney General.

RAILROADS—CROSSINGS

May 21st, 1930.

Hon. Chas. A. Randall,
Nebraska State Railway Commission,
Lincoln, Nebr.
Dear, Sir:

Pursuant to your request, the question propounded by Mr. H. E. Christman has been considered by this department. Mr. Christman's question may be stated thus:

> "Is a railroad company required to do all the grading and build all the bridges within its right-of-way, where it is crossed by a public highway?"

Section 5524, Compiled Statutes of Nebraska for 1922, relating to this subject, is, in part, as follows:

> "It is hereby made the duty of every person or corporation, owning or operating any railroad, crossed by a public road, to make and keep in good repair, good and sufficient crossing for such road over their tracks, including all the grading, bridges, ditches, and culverts that may be necessary within their right-of-way."

Ans. The rule is this: The public authorities must build that part of the highway within the right-of-way which they would have been required to build had the railroad not been constructed; the railway company must build the other parts.

In State v. C. B. & Q. R. Co., 29 Neb. 412, the Supreme Court of this state said:

> "It has been frequently decided by the courts that under the police power the legislature may compel existing railroad corporations to fence their tracks and put in cattle guards. (Authorities cited). By a parity of reason the law-making power may make it the duty of railroad companies to construct and keep in repair highway crossings, notwithstanding the railroad was built before the enactment of the law. Such a burden is not in violation of the constitutional provision requiring that taxes shall be equal. Similar laws have been held constitutional. (Authorities cited). The Supreme Court of Illinois, in I. C. R. R. Co. v. Bloomington, 76 Ill. 451, declare a similar law unconstitutional.
>
> "We do not mean to be understood as deciding that it is the duty of a railroad corporation to construct and keep in repair all highways laid on or across its right of way. What we hold is that it must construct suitable crossings in that part of the highways within the right of way made necessary by the building of the railroad, and keep the same in repair. If the railroad track is laid above the natural surface of the ground where the highway crosses it, the crossing would include suitable approaches. If the track is below the natural surface of the ground, the crossing would include whatever is necessary to to make a reasonably safe way for persons traveling the highway to cross the railroad.
>
> "It cannot be said that the public good requires that the burden should be upon the railroad company to construct the remainder of the public highway within the right of way. No serious consequences would likely result from requiring the public authorities to construct the highway after the crossings and approaches are put in. We think that it is the duty of the public auhorities to construct and keep in repair all the highway within the right of way which they would have been required to build had the railroad not been constructed. (Authorities cited)."

In Missouri Pacific R. Co. v. Cass County, 76 Neb. 396, the court approved the language above quoted.

See also State v. Papillion Drainage Dist., 89 Neb. 808.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HUGH LAMASTER, Assistant Attorney General.

IRRIGATION DISTRICT OR COMPANY—BRIDGES

May 13th, 1930.

Hon. Chas. A. Randall, Commissioner,
Nebraska State Railway Commission,
State Capitol,
Lincoln, Nebr.
Dear Sir:

The question, which you submitted at the request of Mr. E. W. Wedge, of Cozad, Nebraska, has been given consideration.

The question is as follows:

> A tract of land is so bisected by an irrigation ditch as to leave a portion of the land wholly inaccessible to its owner, as such portion is surrounded by lands belonging to others, except where it is bounded by the irrigation ditch, over which there is no bridge. In order to reach the tract thus cut off, it will be necessary to construct a bridge. The irrigation ditch was placed across the land prior to its purchase by the present owner. Is it the duty of the irrigation company or district, to construct and maintain such bridge?

It is the opinion of this department that it is incumbent upon the irrigation company, or district, to construct and maintain the bridge.

A similar quesion was presented in the case of State v. Farmers Irrigation District (98 Nebr. 239). The court stated the facts in that case as follows:

> "Relator is the owner of land in the south half of section 18, township 22, range 53, in Scott's Bluff county, which land is traversed by the irrigation canal of respondent. About 120 acres lie north and about 26 acres south of the canal. Relator brought this action in the district court for Scotts Bluff county to compel respondent to construct a bridge across the canal so as to connect the two tracts of land. From a judgment denying a writ and dismissing his action, he appeals.
>
> "The action is based on the provisions of section 3438, Rev. St. 1913, viz.: 'Any person, company, corporation, or association constructing a ditch or canal through the lands of any

person, company, or corporation having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land; in all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any inclosed field.' The case turns upon the construction to be given to the words 'in all cases' immediately following the semicolon. Does the requirement of the section, beginning with those words, relate to lands owned by one person and located on both sides of the ditch at the time the ditch was constructed, or does it relate as well to cases subsequently arising where one person becomes the owner of lands on both sides? In 1906 the Tri-State Land Company, being the then owner of the entire tract of land, constructed the irrigation canal through the same. In 1909 it sold the canal, together with the right of way, to the Farmers Mutual Canal Company. After the construction of the canal, and after the sale of the same to the Farmers Mutual Canal Company, the Tri-State Land Company sold the lands in controversy to relator; and at a still later date the Farmers Mutual Canal Company conveyed the canal and right of way to the respondent Farmers Irrigation District. It is contended by respondent, in support of the judgment of the district court, that, the canal having been built by the Tri-State Land Company while it owned the land, the canal was constructed through the lands of a corporation having an interest in the canal, and that, such being the fact, the land, by virtue of such interest in its owner at that time, was thereby excluded from the provisions of the statute, and, hence, the statute does not apply to the present case; that the statute does not apply where the canal is constructed over the land with the consent of the landowner, and does not apply to cases where the necessity for a bridge occurs at a time subsequent to the building of the canal."

In its discussion, the court said:

"We are unable to concur in this construction. The statute is not ambiguous, and must therefore be construed according to its terms. It provides, first, the manner in which the ditch or canal shall be constructed, viz., 'in a substantial manner so as to prevent damage to such land.' This provision relates solely to the manner of construction. The words 'through the lands of any person, company, or corporation' do not limit the statute

to cases where the ditch cuts **through** the land of some individual owner, leaving land on both sides thereof. They apply as well to lands abutting on a ditch. As to all such lands, as well as those actually penetrated or cut in two by a ditch, it must be constructed 'in a substantial manner so as to prevent damage to such land.' The statute then procedes to say what shall be done so as to enable owners of lands on both sides of the ditch to have 'the free and convenient use' of such lands, and provides that, where it is necessary for the free and convenient use of lands on both sides of the ditch, the owner of the ditch shall erect substantial and convenient bridges across its canal or ditch 'in all cases.' The words, 'in all cases,' mean precisely the same, whether they be used, as in the statute, immediately preceding the requirement for the construction of bridges, or immediately following such requirement. If the legislature had intended this requirement to relate only to conditions as they existed at the time the ditch was constructed, it would have been an easy matter to have said so. We see no difference between the rule which should be applied in construing this statute and that applied to the statute requiring railway companies to construct farm crossings across their roads. The principle involved is the same in each."

In discussing the requirement that irrigation districts should erect and maintain such bridges, the court said, with respect to constitutionality:

"It is next said that he section under consideration is void, for the reason that respondent is given no compensation for the taking of its property for the purpose of a bridge, and that it would take the property of respondent for private purpose. The answer to this contention is that the burden thus imposed upon a ditch company constitutes a part of the consideration for the valuable right of eminent domain given it by the statute. Without such right it could not build its ditch through a man's farm. Having accepted the right to build, regardless of the wish if the landowner, it must take that right burdened with the conditions imposed by the legislature. The question of the weight of the burden is one for the consideration of that body, and not for the court."

The judgment of the district court was reversed, and the irrigation district was required to construct the bridge.

The case went to the Supreme Court of the United States, where it appears under the title of Farmers Irrigation District v. State of Nebraska (244 U. S. 325, 61 Law. Ed. 1168). The decision of the Supreme

Court of Nebraska was affirmed. In its decision of the constitutional questions involved, the Supreme Court of the United States said:

> "* * * The state was not obliged to confer upon this corporation the sovereign authority to take property by the right of eminent domain. When it did so, we do not think it took the property of the corporation without compensation when it also obliged the latter to comply with the conditions of this grant of power, one of which was that it should construct bridges under the circumstances now presented.
>
> "Nor do we think it makes any difference that the corporation was not obliged to exercise the power of eminent domain to obtain this particular right of way. This right existed, was conferred by the state, and might be used to construct other portions of the canal for the purposes intended. In this construction and application of the legislation of the state we are unable to find the taking of property without compensation, as is contended by the plaintiffs in error.
>
> "As to the denial of the equal protection of the laws, this court has frequently held that there is nothing in this provision of the 14th Amendment to prevent the states from reasonable classification of subjects for legislative action. This statute applies equally to all owners of irrigation canals. The fact that it does not embrace canals constructed for other uses and purposes does not make it obnoxious to the equal protection clause of the 14th Amendment."

The statute, being Section 3438, Revised Statutes of Nebraska for 1913, remained in force until 1919. It was repealed by chapter 190, Civil Administrative Code, Laws of 1919, page 434. A new provision, being section 11, division 3 of Article V, of Civil Administrative Code, Laws of 1919, page 850, was enacted. That law is still in force, and appears as section 8461, Compiled Statutes of Nebraska for 1922. It reads as follows:

> "Any person, constructing a ditch or canal through the lands of another, having no interest in said ditch or canal shall build such ditch or canal in a substantial manner so as to prevent damage to such land. In all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any enclosed field."

While there is some difference between the language employed in the 1919 act, and that used in the 1913 act, there does not appear to be any substantial change in meaning. It is, therefore, concluded that it is the duty of the irrigation company, or district, as the case may be, to construct and maintain such bridges. It will be observed that the statute above quoted does not specify that the company, or disrict, shall maintain such bridge, but it is apparent from the language of the act that a bridge must be built by the company, or district, where it is "necessary for the free and convenient use of lands on both sides of the dicth or canal." The word "use" implies a continued duty upon the builder of the bridge to maintain it.

The case of Lindeman v. St. J. & G. I. R. R. Company (113 Nebr. 284), involving the right to require a crossing over a railroad which severs a tract of land, making one portion thereof inaccessible, is in point in this matter as throwing light on the principle involved.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HUGH LAMASTER Assistant Attorney General.

ELECTRIC LIGHT AND POWER COMPANIES—RATES OUTSIDE CITIES—RAILWAY COMMISSION

January 10th, 1930.

Hugh Drake, Secretary,
Nebraska State Railway Commission,
Office.
Dear Sir:

The State Railway Commission has submitted, by its Chairman, Mr. Curtiss, the following:

> "Has the Nebraska State Railway Commission general jurisdiction over the rates that may be charged an individual consumer by an electric power company, outside of the limits of incorporated cities and villages, whether such consumer's line is already connected with the company's lines or not?"

The question has been considered by this department and it is our conclusion that the Commission has such jurisdiction. The power of the Commission is based on Chapter 170, Laws of Nebraska, 1923, as amended by Chapter 143, Laws of Nebraska, 1925.

The question is not a new one, having been propounded under the 1923 act. In a communication to the Railway Commission, dated April 25, 1924, this department expressed the opinion that under that act the Commission had such jurisdiction. The subject has been carefully re-

examined in connection with the 1925 act. The latter act affords additional grounds for the conclusion heretofore reached.

The legislative history of each of the acts has been examined and no irregularity of moment has been observed. The senate journal does not show that the 1923 act was signed by the president of the senate in the presence of that body, while in session and capable of transacting business. The enrolled act, however, on file in the office of the Secretary of State, bears the signatures of all the legislative officers, including the president of the senate, required by the Constitution to sign bills. Under these circumstances, it is immaterial that the senate journal does not show the signing by its presiding officer. It is only the omission of those things which are expressly required by the Constitution to be included in the journals that affect the validity of a statute. State v. Cox, 105 Neb. 75, holds that the constitution does not require that every step in the passage of a bill be spread upon the journal, and that an omission to show a step raises no presumption that such step was not taken, except as to those acts which the constitution explicitly requires to be shown upon the journal.

Even though the president of the senate had failed to sign the bill, if all of the other legislative officers, whose signatures are required had signed, and the bill had been properly approved by the Governor, the irregularity would not have vitiated the law. Cottrell v. State, 9 Neb. 125. See also State v. Neb. State Railway Commission, 100 Neb. 700.

It will assist in making the subject clearer if the title and sections 1 and 2 of the 1923 act, the title and sections 1 and 2 of the act of 1925, are set forth in full. The title of the act of 1923 and the first two sections thereof, are as follows:

> "AN ACT to provide that electric transmission lines and power companies of Nebraska shall afford and give to all persons, associations, and corporations upon reasonable and equal terms, service facilities and physical connection to their lines running between cities and villages within this state, and to provide for the enforcement of the provisions of this act.
>
> "Section 1. All persons, associations, companies and corporations engaged in the generating and transmitting of electric current for sale in the state for power or other purposes, where the said person, association, company or corporation operates an electric transmission line outside of the limits of incorporated cities or villages in this state, and between incorporated cites and villages in this state shall, under rates, charges, rules, regulations, permits, conditions and authority to be made, prescribed

and granted by the Nebraska State Railway Commission, furnish facilities, accommodations and service upon application for physical connection to:

"(a) Any individual or any person who may reside along or immediately adjacent to such an electric transmission line who may apply for physical connection and service.

"(b) Any association or corporation which may be formed for the purpose of building its own line with facilities and equipment and which may apply for physical connection and service from such high powered electric transmission line and thereby transmit electric current for its own use or general purchase and sale.

"(c) Any municipal corporation which may construct or acquire its own lines which may apply for such physical connection and service from such electric transmission line which may be constructed to or pass by or through said city or village.

"(d) Any such other person, association or corporation possessing by ownership or lease lines equipped for the transmission of electric current for its own use or general purchase or sale which may apply for physical connection and service.

"Section 2. That whenever any customer or applicant of any of the classes hereinbefore named shall make application for such physical connection and service, the customer shall provide himself with and bear the expense of necessary lines, poles, transformers and other equipment required to make such physical connection and receive such service.

"Provided, that if the said electric transmission or power company and the customer cannot agree upon what may be just and equitable as the fee for making the said physical connection with said line, or the customer shall allege that the said electric transmission or power company is not treating all persons, associations, or corporations fairly and equally and without discrimination or favoritism, or if such person, association or corporation shall feel dissatisfied with or aggrieved by reason of the amount required to be paid or contributed for making the said physical connection and receipt of such service, said person, association, or corporation may file his or its application with the Nebraska State Railway Commission which shall proceed to make investigation and to hold any necessary hearings and make a finding and order as to what would be the proper, just and equitable fee for making such physical connection with said electric transmission line."

The title and the first two sections of the amendatory act of 1925 are as follows:

"AN ACT to amend Sections 1 and 2, Chapter 170, Laws of Nebraska for 1923, relating to Electric Transmission Lines and Power Companies; clothing the Nebraska State Railway Commission with power and authority to make findings concerning rates and service concerning electric current distributed for light, heat or power purposes from such lines or companies; and to repeal said original sections.

"Section 1. All persons, associations, companies and corporations engaged either in the generating or transmitting of electric current for sale, or both, in the state for power or other puposes, where the said person, association, company or corporation operates an electric transmission line outside of the limits of incorporated cities or villages in this state shall, under rates, charges, rules, regulations, permits, conditions and authority to be made, prescribed and granted by the Nebraska State Railway Commission, furnish facilities, accommodations and service upon application for same to:

"(a) Any individual or any person who may reside in a territory which may be served by an electric transmission line who may apply for physical connection and service.

"(b) Any association or corporation which may be formed for the purpose of building its own line with facilities and equipment and which may apply for physical connection and service from such high powered electric transmission line and thereby transmit electric current for its own use or general purchase and sale.

"(c) Any municipal corporation which may construct or acqire its own lines and which may apply for such physical connection and service from such electric transmission lines.

"(d) Any such other person, association or corporation possessing by ownership or lease lines equipped for the transmission of electric current for its own use or general purchase or sale which may apply for physical connection and service.

"Section 2. That whenever any customer or applicant of any of the classes hereinbefore named shall make application for such physical connection and service, the customer shall provide himself with and bear the expense of necessary lines, poles, transformers and other equipment required to make such physical connection and receive such service:

"Provided, that if the said electric transmission or power company and the customer cannot agree upon what may be just and equitable as the fee for making the said physical connection with said line, or the customer shall allege that the said electric transmission or power company is not treating all persons, associations or corporations fairly and equally and without discrimination or favoritism, or if such person, association or corporation shall feel dissatisfied with or aggrieved by reason of the amount required to be paid or contributed for making the said physical connection and receipt of such service, said person, association or corporation may file his or its application with the Nebraska State Railway Commission which shall proceed to make investigation and to hold any necessary hearings, and make a finding and order as to what would be the proper, just and equitable fee for making such physical connection with said electric transmission line; and the Nebraska State Railway Commission, shall upon application of any consumer, proceed to make an investigation and hold the necessary hearings and make a finding and order as to what reasonable rates shall be charged to consumers of electricity for light, heat, or power purposes, or by the person, firm or corporation purchasing electricity or electric current for distribution from such line or company; and the said Railway Commission shall, from time to time, make such reasonable regulations as to the service which shall be given to such consumers by such lines or companies."

Some doubt has been expressed as to whether or not the language of the acts, as contained in the bodies thereof, is sufficient to confer jurisdiction upon the commission. This phase will be considered first, though contrary to the usual order, as a matter of convenience, and the questions concerning the title of the acts will be taken up later.

That the act of 1923 confers jurisdiction upon the State Railway Commission to fix rates to be paid by an individual consumer of electricity when such consumer asks that his line be physically connected with the lines of a power company is so clearly set forth in seciton 1 as to be beyond question.

It has been urged, however, that the 1923 act relates only to prospective customers of electric power companies seeking to have their lines physically connected with the lines of such companies. But the statute is amply broad to authorize the Commission to prescribe rates, whether the request therefor is coupled with a request for physical connection of the lines or not. Section 1 of the 1923 act provides that all persons, associations, companies and corporations, engaged in gener

ating and transmitting electric current for sale, shall furnish, under rates, charges, rules, regulations, permits, conditions and authority to be prescribed by the Nebraska State Railway Commission, facilities, accommodations and service, upon application for physical connection, to the several classes of customers enumerated in the act. Section 2 provides that if the company and the customer cannot agree upon the fee for making the physical connection with the line, or if the customer shall allege that the electric transmission line or power company is not treating all persons fairly, equally and without discrimination, or if the customer is aggrieved by the charge for the physical connection and for the service, he may appeal to the Nebraska State Railway Commission. In connection with such an appeal, the Commission, under the terms of the statute, may fixe rates, charges, etc. It will be noted that the statute uses the term "customer," and that a "customer" may complain of discrimination.

It is hardly likely that the word "customer" would have been used unless it was intended to include those who were already receiving service and not merely applicants for connection of lines. The word connotes regularity and continuity as well as previous dealings. Furthermore the discrimination, unequal treatment and favoritism, of which compalint may be made, are not confined to the charge for making the physical connection of lines but are general in their nature. Our conclusion is that the Commission had, under the 1923 act, full power to fix rates upon the complaint of any customer, although he may have long previously had his lines connected with the transmission lines. This view is strengthened by the history of the legislation. As orig-finally introduced, Section 1, first paragraph, provided as follows:

> "All persons, associations, companies and corporations engaged in the generating and transmitting of electric current for sale in the state for power or other purposes, where the said person, association, company or corporation operates an electric transmission line outside of the limits of incorporated cities or villages in this state, and between incorporated cities and villages in this state shall furnish facilities, accommodations and service upon application for physical connection to:"

During its progress in the House, it was amended as follows: After the word "shall," in the second from the last line, there was added, "under rates, charges, rules, regulations, permits, conditions and authority to be made, prescribed and granted by the Nebraska State Railway Commission." If the intention of the Legislature was merely to provide for physical connection of the lines, there was no necessity of specifying rules, regulations and conditions, which indicate a general and continuing control.

Furthermore, a construction that leads to an absurd conclusion should not be adopted. If the Commission have no power to fix rates except in the case of an application for connection of the lines, it would have no power to prevent discrimination. And, unless the Commission were vested with continuing authority to fix the conditions of service, an electric company might comply nominally with the order of the Commission as to the physical connection of lines and the charges for service, but it might make the conditions so onerous that no one would care to receive the service.

Section 1 as amended broadens the class of individual consumers by including those residing "in a territory which may be served" by a line instead of confining it merely to those who "reside along or immediately adjacent to" such a line. The part of Section 2 added in 1925, fully vests the State Railway Commission, upon application of any consumer, to make an investigation and to fix the rates to be charged to consumers, of electricity for light, heat or power purposes. The power of the Commission is a continuing one, for it is authorized to make, "from time to time," reasonable regulations as to service given to consumers.

As the statutes under consideration constitute remedial legislation, they should, of course, receive liberal construction. McIntosh v. Johnson, 51 Neb. 33.

The only matter connected with the statutes that might raise a doubt as to their validity is whether or not the titles of the acts are sufficient to cover the legislation, under Const. Art. III, Sec. 14, which requires that, "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." That was the question under the 1923 act that was given particular attention in the former opinion of this department, reference to which is made above. The title of the 1923 act provides that companies shall afford "* * * upon reasonable and equal terms, service facilities and physical connections to their lines * * *". The expression "Service facilities" is unusual. In fact, a careful examination of the dictionaries, works on words and phrases, and text books, fails to disclose its use. It is redundant, for the term "facilities" includes all that may be expressed by the term "service facilities." It is obvious that the legislature did not have in mind requiring the power companies to furnish facilities such as poles, transformers and other equipment required to make physical connection and give service, because it imposed (Sec. 2, 1923 act) upon the customer the duty of providing himself with them.

If possible, and consistent with reason, each word of the statute should be given effect, McIntosh v. Johnson, supra., State v. Fink, 74 Neb. 641, Gage County v. Wright, 86 Neb. 347; and each word should be

given its ordinary meaning. As above stated, the statute being remedial should receive a liberal construction. The constitutional provision should also be liberally construed. Affholder v. State, 51 Neb. 91.

The following cases illustrate the liberality with which titles are treated: People v. McCallum, 1 Neb. 182, Affholder v. State, 51 Neb. 91, Alperson v. Whalen, 74 Neb. 680, State v. Ure, 91 Neb. 31, State v. Barton, 91 Neb. 96, State v. Badberg, 108 Neb. 816, Sheridan Co. v. Hand, 114 Neb. 813.

It is a well established rule that where the words of a statute give a clear and reasonable meaning such meaning will prevaile over the punctuation, if the punctuation tends to give some other meaning. The rule is that courts will disregard punctuation marks, or will supply needed punctuation marks, where the meaning conveyed by the words themselves so requires. U. S. v. Isham, 17 Wall. 496, Ford v. D. & P Land Co., 164 U. S. 662, Crawford v. Burke, 195 U. S. 176, In Re Peterson's Will (Iowa) 172 N. W. Rep. 206, U. S. v. Oregon S. L. R. Co., 164 U. S. 541, U. S. v. Lacher, 134 U. S. 624. In the last case the court said, "For the purposes of arriving at the true meaning of a statute, courts read such stops as are manifestly required." In Chicago M. & St. P. Ry. Co. v. Voelker, 129 Fed. 522, it is said (527):

> "Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning."

It is obvious that it was intended that the title of the act should cover service, facilities and physical connection and that there should be a stop between the word "service" and the word "facilities." As above pointed out, "service facilities" is not a recognized term in public utility law, and if it should be considered to cover poles, transformers, etc., it would render the title inapplicable as it is not incumbent upon the company, but upon the customer, to provide them. Therefore, the only reasonable way of reading the statute is to place a stop, a comma, between "service" and one that is consonant with the provisions of the original act and is in harmony with the provisions of the amendatory act.

The title of the amendatory act provides for "clothing the Nebraska State Railway Commission with power and authority to make findings concerning rates and service concerning electric current distributed for light, etc." While it has been held that the title of an amendatory act may expand the title of the original act, Andrews v. Board (Idaho), 63 Pac. 592: (see also Schmalz v. Wooley, 57 N. J. Eq. 303, Morris etc. R. Co. v. Jersey City, 63 N. J. Eq. 45) we are rather inclined to think that under the Nebraska cases, the rule is that where

an act appears to be amendatory, as the act of 1925 does, nothing can be included in the sections as amended that is not covered by the title of the original act. But thus restricted, the title of the original act is fully sufficient. It covers service, facilities and physical connection of lines. The fact that the legislature added the provision concerning rates, while the law was in process of enactment, clearly shows the intention of that body. The general purposes of the constitutional provision requiring that an act shall contain only one subject, which shall be clearly expressed in its title, are succinctly stated by the Supreme Court in State v. Tibbets, 52 Neb. 228 (233), as follows:

> "The purpose of the constitutional provision under consideration, as has been repeatedly declared to be, is to give notice, through the title of the bill, to the members of the legislature and the public, of the subject-matter of the projected law,—in other words, that the title should clearly indicate the legislation embraced in the bill. While the requirements of this clause of the constitution are mandatory, they are not to be exactingly enforced, or in such a manner as to hamper or cripple legislation. The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute. It is sufficient if they are all referable and cognate to the subject expressed. When the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is embraced in and authorized by it. If the subject-matter is within the scope of the title, the constitutional requirement is met."

See also State v. Eskew, 64 Neb. 600, Dinuzzo v. State, 85 Neb. 351. Even assuming that under the 1923 act jurisdiction was not given to the Commission to fix rates, on the application of a customer, except in conjunction with an application for a physical connection of lines, the change under the 1925 act was not one of kind, but only one of degree. The Commission was not given any different power by the 1925 act, or even any additional power, except to exercise its power independently of an application for physical connection of lines. If the title of the 1923 act was sufficient to vest the Commission with rate making power in the one case, it certainly is in the other. All provisions of the 1925 act are clearly within the title of the 1923 act, and all of the changes made by the 1925 act are germane to the sections amended.

The public character of electric power companies is universally admitted and it is specifically recognized in this state in the grant by the legislature, Compiled Statutes 1922, Section 7099, to such companies of

a right of way over the highways of this state. See Western Union Tele. Co. v. Foster (Mass.) 113 N. E. 192.

The construction of electric transmission lines on the highways is placed under the regulation of the State Railway Commission. Comp. Stat. of Nebraska, 1922, sections 7101 et seq. and sections 711 et seq. The 1923 act and the 1925 act give the Commission general control of the rates and service of electric companies.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HUGH LAMASTER, Assistant Attorney General.

WAREHOUSES—GRAIN

May 14th, 1930.

Hon. H. J. McLaughlin, Sec'y.,
Department of Agriculture,
State Capitol,
Lincoln, Nebr.
Dear Sir:

The following questions, concerning House Roll No. 11, the recently enacted grain warehouse law, have been submitted to this department. The questions and the respective answers are as follows:

1. A grain elevator, not licensed as a warehouse, receives grain and holds it ten days or less without specific directions, as to its disposition, from the owner of the grain. Does such a transaction fall within the warehouse law?

A. The law is so indefinite and uncertain that no one can answer the question with assurance. When the matter was pending before the Legislature, the writer suggested to the legislative committee, having the bill in charge, to amend it by inserting a specific provision, such as that contained in the former law, fixing the exact time, after which grain would be conclusively deemed to be in storage; but the suggestion was not followed. Viewing the entire act, however, it seems to be its intent not to cover grain not held more than ten days by an unlicensed elevator.

2. A grain elevator, not licensed as a warehouse, receives grain and holds it for more than ten days without specific directions, as to its disposition, from the owner of the grain. Is such a transaction within the grain warehouse law?

A. It seems to be covered by the law, a warehouseman so

holding grain seems to be liable to prosecution for storing without a license.

3. A farmer delivers grain to an unlicensed elevator without making any arrangement either for sale or for storage. Must settlement be made for the grain at the expiration of the ten-day period, computed from the date when delivery starts, or should such period be computed from the date delivery is completed?

A. The ten-day period dates from the delivery of each load of grain. The statute appears to contemplate that the delivery of each load of grain shall be treated as an independent transaction.

4. Should an inspector, appointed by the Department of Agriculture of this state, examine all records of a grain warehouseman, or only that part pertaining to storage or consignment?

A. He should investigate all records pertaining to the warehouseman's grain business, those relating to merchandising of grain, as well as those relating to storage of grain.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HUGH LAMASTER, Assistant Attorney General.

BOOTLEGGER—PENALTY—BOTH FINE AND IMPRISONMENT

January 6, 1930.

Mr. A. E. DuBois,
Crawford, Nebraska.
Dear Sir:

We have your letter of December 27, 1929, with reference to Chapter 77, Session Laws, 1929, in which you ask whether this law requires a magistrate to impose a penalty of both fine and imprisonment for conviction as a bootlegger, or whether the offender may be either fined or imprisoned, or both, in the discretion of the magistrate.

According to 16 C. J. 1362, Section 3207, courts have construed statutes providing for a penalty of fine "and" imprisonment both ways; some courts holding that the magistrate is required to impose both penalties while other courts hold that he may impose either or both in his discretion. The question does not seem to have been passed upon by our court.

From the history of this legislation, however, and from the plain,

ordinary meaning of the language used, we think it is reasonably evident that the legislature intended to increase the penalty by requiring that both a fine and imprisonment be imposed. If the legislature had intended to leave the matter to the discretion of the magistrate either to fine or imprison, or both, in his discretion, it could very easily have found appropriate words in which to say so. The language used indicates that it did not intend to leave the imposition of one or both penalties to the discretion of the magistrate but did intend that he impose both penalties in case of conviction. Unless the Supreme Court should rule otherwise we feel constrained to adopt what seems to us to have been the plain intention of the legislature and to hold that the justice of the peace or other magistrate must impose both a fine and imprisonment for violation of this statute.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

LOTTERY—MINT-VENDING MACHINES

September 3, 1930.

Mr. J. T. Rutledge,
Red Cloud, Nebraska.
Dear Sir:

Your letter of September 1st at hand with reference to a mint vending machine which you say "pays five cents roll of mints for every nickel that is put in and also at different times it puts out as a premium two, three or four chips that can be exchanged for goods at the counter or be used to play baseball in the machine."

In a case involving a similar mint vending machine the district court of Lancaster County held that the operation of such a machine was illegal and subjected the operators to prosecution.

We did not make the law but since you ask what it is we have told you. The laws of Nebraska make illegal any and all games of chance of every kind.

Sincerely yours,

C. A. SORENSEN, Attorney General.

SUNDAY AMUSEMENTS—WHAT ARE PROHIBITED

May 1, 1930.

Reverend Harold C. Jensen,
Dannebrog, Nebraska.
Reverend and Dear Sir:

This is in answer to your kind letter of April 23, 1930, requesting information regarding the state law on Sunday amusements at the county fair and roller skating rink.

The only Sunday amusements prohibited by state law are hunting, shooting and ball-playing without the authority prescribed by Section 9795, Compiled Statutes of Nebraska, 1922. No separate pamphlet copies of this law are available, and the same is too lengthy to be set out here. But any attorney or public official of your county will be pleased to give you access to the law. This law also prohibits Sunday dancing but that feature was held unconstitutional by our Supreme Court in Galloway v. Wolff, 223 N. W. 1, and the Legislature has not yet passed a new law on the subject.

Cities or villages may, of course, enact and enforce ordinances prohibiting Sunday amusements within their corporate limits (Secs. 4191 and 4229, Compiled Statutes, 1922).

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

MARRIAGE—COUSINS "OF WHOLE BLOOD" DEFINED

June 14, 1930.

Rev. Theo. H. Buelt,
Elgin, Nebr.
Dear Father Buelt:

Some time ago you called attention to the provisions of Section 1491, Compiled Statutes of Nebraska, 1922 forbidding parties from marrying who stood in the relationship of first cousins "of whole blood." You asked if this means that only cases where both parents of one cousin bear their relationship of brother or sister to both parents of the other cousin, or if it includes the ordinary case where one parent of one cousin is the uncle of aunt of the other cousin.

I have been unable to find anything very definite on this point as the term "whole blood" is applied very rarely to cousins but commonly

to the relationship of brother or sister to distinguish a full brother or sister and a half brother or sister. I am inclined to think, however, that the term "whole blood" as applied to cousins in the statute is meant to by synonymous with "first" or "full" cousin and not to include merely those rare cases where both parents of one are the uncle and aunt of the other.

Webster's New International Dictionary defines cousins as, "the son or daughter of one's uncle or aunt (called more fully own, first or full cousin or cousin german)."

It seems to me that the legislature used the term "whole blood" as the equivalent of first or full cousin, to distinguish their relationship from second cousins, quarter cousins, etc.

Very truly yours,

C. A. SORENSEN, Attorney General.

JUVENILE COURTS—PUBLIC HEARINGS

Februarp 25, 1930.

Honorable E. B. Chappell,
Judge of the District Court,
Court House,
Lincoln, Nebraska.
Dear Judge:

Recently you asked for our opinion as to whether the law required hearings of the juvenile court to be public.

Section 1093, Compiled Statutes of Nebraska, 1922, provides that "all judicial proceedings must be public unless otherwise specially provided by statute."

Section 1190, Compiled Statutes of Nebraska, 1922, relating to juvenile courts, provides in substance that this article shall be liberally construed to the end that its purpose of caring for, protecting and disciplining neglected and delinquent children, should be carried out.

We believe it is generally agreed among welfare workers and authorities on juvenile delinquency that better results are obtained in juvenile court proceedings, and the spirit of the juvenile court laws better preserved, when the formalities which attend ordinary court proceedings are dispensed with, and when the general public, as far as possible, is excluded from the hearings.

We do not find any specific statute authorizing the exclusion of the public from hearings before the juvenile court, but in the case of Laurie

v. State, 108 Neb. 239, the statutes creating the juvenile court and defining its powers were thoroughly discussed and the opinion of the court was summed up as follows:

> "The object of the law is corrective. Great discretion is given the judge of the juvenile court as to how this shall be accomplished."

Even if it could be said that proceedings before the juvenile court must be public we think the court would be upheld in excluding from the hearing people who are impelled to be present by idle curiosity and who have no genuine interest in the case.

In Farmers Elevator Company v. The Chicago, etc. Railroad Company, 266 Ill. 567, 573, 107 N. E. 841, it was held:

> "The words 'public hearing' before any tribunal or body, by the accepted definitions of lexicographers and courts, mean the right to appear and give evidence and also the right to hear and examine the witnesses whose testimony is presented by opposing parties."

In People v. Hall, 64 N. Y. S. 433, 436, the court said in defining the term "public trial":

> "It is apparent, therefore, that while the defendant is entitled to a public trial, good morals or the exigencies of the situation may make that a relative term without injury to the defendant, and without infringement upon the sanctity of the rights granted to him; that such discretion is vested in the presiding judge, and the test is whether or not it has been abused."

In Robertson v. State, 64 Fla. 437, 60 Southern 118, the court held that the word "public" as used in the constitution guaranteeing to all persons accused of a crime a public trial, is there used in opposition to "secret." The court went on to say:

> "The constitutional requirement is fairly observed if, without partiality or favoritism, a reasonable portion of the public is suffered to attend, notwithstanding that those persons whose presence would be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether. The exclusion by the court of all persons other than those interested in the case, where, from the character of the charge and nature of the evidence, public morality would be injuriously affected, does not violate the constitutional right to a public trial."

Essentially the same view is taken in State v. Hensley, 75 Ohio

State 255, 79 N. E. 462, 9 L. R. A. N. S. 277.

It is our opinion, therefore, that the juvenile court would probably be upheld should it, in the exercise of its discretion, admit to the hearings only that part of the public who have a genuine interest in the case and exclude those who come merely from motives of idle curiosity.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

PUBLIC FUNDS—DISPOSITION OF INTEREST ON

March 17, 1930.

Mr. Walter M. Crow,
County Attorney,
Hastings, Nebraska.
Dear Sir:

Mr. C. R. Warren of this city who informs use that he is acting at your request has asked us to write you our opinion upon the following questions which he says are of interest in your county, to-wit:

"First—Who is entitled to Interest received on funds of the Clerk of District Court's office—such as advance costs, trust funds, etc. lying in Banks?

"Second—The same for the Judge's office?

"Third—Who is entitled to keep the five cent (.05) fee collected on auto licenses—the Treasurer personally or the County?

"Fourth—What jurisdiction or authority has a County Judge to suspend fines or defer collection of same or leave prisoner at liberty until paid?

"Fifth—Is Sheriff entitled to commissions on money collected at Sheriffs' Sales, for personal use?"

We will endeavor to answer the above questions in the order in which they are asked.

1. I am of the opinion that interest on a trust fund should go into the trust fund from which it was derived. If interest accrues on other funds deposited in bank by the clerk of the district court, I am of the opinion the safe course to follow is to turn it in to the county general fund unless it accrues upon money which eventually goes to the clerk himself. In such a case I know of no reason why it may not be retained by the clerk.

2. The same rules apply as to money deposited in bank by a county judge.

3. I am of the opinion that the five cent fee collected on auto licenses should be accounted for by the county treasurer just as other fees of his office are accounted for. In counties where the fees of the office exceed the compensation allowed the treasurer and his deputies and assistants (this is most of them) such fees go into the county general fund.

Section 8337, Compiled Statutes, as amended by Chapter 159, Session Laws of 1925, provides among other things that "Said five cents (5c) shall be accounted for as other fees."

4. I do not recall that the statute gives a county judge any express authority to suspend the collection of a fine except in a case where the fine is replevied but neither do I know of any statutory provision which compels a county judge to commit a convicted person at once upon the nonpayment of a fine.

The language of the statute is permissive in that respect. (See Section 10167, Compiled Statutes).

5. I am of the opinion that a sheriff should turn over to the county commissioners all money collected by him at sheriff's sale. I do not think he is entitled to retain it for his own use.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

COUNTY ROADS—FUNDS FOR

October 9, 1930.

Hon. R. C. Regan,
Columbus, Nebraska.
Dear Sir:

You say:

"Calling your attention to the latter part of Chapter 180, Laws 1929 (Section 2630) I wish to know if this money can be used on roads designated as county roads and on county roads only?

"Also want to know about the 1 cent gasoline tax turned over to the counties. Can any of that be used for the purchase of machinery?"

The latter part of Section 2630, Compiled Statutes as amended by Chapter 180 Session Laws of 1929 provides that,

> "In counties under township organization all of said moneys collected as a county road levy shall constitute a county road fund to be expended by the county board for the benefit of all the county roads as may be deemed best and no part of said moneys need to be paid to the townships in said counties for expenditure by said township officers."

Section 12 of Chapter 168 Session Laws of 1929, provides among other things that the part of the gasoline tax turned over to the county treasurers shall be turned over to the county road fund. And Section 2653 Compiled Statutes provides that,

> "It shall be the duty of the boards of county commissioners and supervisors to purchase and provide suitable and adequate graders, rollers, and all other machinery, tools and appliances necessary for the efficient maintenance and repair of the county roads; and it shall be the duty of the county highway commissioner to devote his time constantly to keeping the system of county roads in perfect condition and repair, and to see that the same are regularly dragged."

Construing these several provisions of statute together I am of the opinion:

1. That the county road fund can be used upon county highways and that in counties under township organization a part of said money may be paid to the townships for expenditure by township officers for expenditure upon highways in the townships which have not been designated as county roads but that no part of it need be turned over for such use.

2. That the part of the gasoline tax turned over to the county treasurer becomes a part of the county road fund and is subject to a like use as the part of that fund raised by taxation.

3. That a part of the county road fund may be used for the purchase of road machinery.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

ROADS—RIGHT OF TELEPHONE COMPANY TO USE

March 12, 1930.

Mr. D. B. Massie,
Couny Attorney Clay County,
Clay Center, Nebraska.
Dear Sir:

We have your letter of the 7th in which you say that a telephone company has placed its poles in the road on the six foot line, and that the poles interfere with the working of the road. You ask for our opinion as to whether the law giving them a right of way along the public roads (Section 7097, Compiled Statutes, 1922) gives them exclusive right to that portion of the road or whether the public has a prior right so that the county authorities could require the telephone company to remove its poles temporarily to give the county an opportunity to work and maintain the roads.

It is our opinion that the statute giving telephone companies the right of way along the public roads does not give such companies exclusive control of even the portion of the highway used by the company, but that the right of the telephone companies to use the public roads must always yield to the right of the public itself and its duly constituted authorities to construct and maintain such public roads, and whenever it is necessary in order to properly build and maintain such roads, that telephone poles must be temporarily removed, the public authorities have the right to compel the telephone companies to remove them for such purpose.

This view seems to us to be not only in harmony with the general intent and purpose of the legislature as shown by its acts providing for the construction and maintenance of public roads, but it is also clearly indicated in reported opinions of our supreme court. In the case of Plattsmouth v. Nebraska Telephone Company, 80 Neb. 460, it was said:

> "That the rights of the defendant in the streets of the city must yield to public necessity or convenience is beyond question or dispute; but having acquired a right in the streets, and having made expenditures on the strength of the grant extended by the city, the authorities are quite uniform that this right cannot be taken away in an arbitrary manner and without reasonable cause."

Again in the case of Alt v. State, 88 Neb. 259, it was stated that the rights of the public as well as property rights must be considered in matters of this kind, and there should be tolerated no resort to so radical a measure as the interruption of traffic.

We think, therefore, that while the county board could not arbitrarily and without reasonable cause require the telephone company to remove its poles from the highway, it can where the construction and maintenance of the highway makes it necessary, require the company to do so to whatever extent is necessary to construct the highway and keep it in proper repair. The rights of the public in the highway are paramount to those of the telephone company.

Yours very truly,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

COSMETOLOGY—PRACTICE OF DEFINED

June 26, 1930.

Miss Veronica Klutke,
Box 195,
St. Edward, Nebraska.
Dear Madam:

You state that you have been fingerwaving for your friends without charge and ask if there is any law forbidding this if one does not have a license.

The 1929 legislature passed what is known as the Cosmetologist Act (Chapter 156, Laws, 1929) forbidding any person to practice hairdressing, beauty culture or cosmetology without having first secured a license from the State Department of Public Welfare under penalty of a fine of from $10.00 to $50.00.

However, the act defines cosmetology to include "any or all work generally or usually included in the term 'hair-dressing' and 'beautiy culture,' and performed in so-called hair-dressing and beauty shops patronized by women and children."

We think that, under this definition, if you are only doing fingerwaving for a few of your personal friends or relatives and not for the public generally, and are making no charge for your services, that you would not be required to secure a license before doing such work.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

WAREHOUSEMAN—FEE

July 28th, 1930.

H. J. McLaughlin,
Secretary of Agriculture,
State of Nebraska.
Dear Sir:

Your question, orally submitted as follows:

What fee is required of a warehouseman under Section 3 of the Public Grain Warehouse Act approved March 17, 1930, who had already paid a fee of $2.00 under the former act, Section 7226, Complied Statutes, 1922?

Under the former law (Section 7226) the annual fee of $2.00 was a prerequisite to the issuance of a license. All licenses expired December 31st. All those who received licenses in 1930 prior to the enactment of the new law, paid the $2.00 fee.

Section 3 of the new Act is in part as follows:

> "The fee shall be five dollars a year or fraction thereof payable annually on July 1st for each license in effect and the fees collected under this section shall be paid July 1st into the State Treasury and credited to a fund hereby created and to be known as the 'Warehouse Inspection Fund,' which fund shall be used, in addition to appropriations by the Legislature, for administration of this Act. Provided, that each state licensed grain warehouse which shall have been licensed for the year 1930, shall, from and after the time this act shall be in full force and take effect, pay for the year 1930 the annual license fee as above provided. Provided warehouses, licensed, and who have paid the fee of $2.00 shall receive credit for $1.50 on their application."

It seems to have been the intention of the Legislature that as those who had paid the fee of $2.00 between January 1st, 1930 and March 17th, 1930, had enjoyed the benefit of a portion of the time for which license had been issued, they should not be allowed the full credit. It was clearly the purpose to allow the $1.50 credit on the license fee due July 1st. The amount fixed seems to be equitable.

It is the opinion of this Department that any warehouseman who had paid the $2.00 fee for a 1930 license, under the former law, should be charged only $3.50 for the annual license fee to be paid, under the

new law, during the year July 1st, 1930 to July 1st, 1931.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HUGH LAMASTER, Assistant Attorney General.

CREAM TESTING—LIABILITY FOR FALSE TESTS

February 19, 1930.

Mr. Henry Obbink,
Bureau of Food, Drugs & Oil,
Department of Agriculture,
Lincoln, Nebraska.
Dear Sir:

Recently you called our attention to Section 7450, Compiled Statutes of Nebraska for 1922, as amended by Chapter 11, Session Laws of 1927, and asked for our opinion as to whether, in prosecutions brought under this statute for fraudulent manipulation in testing cream, it is possible to convict the person, firm or corporation operating a cream buying station, where the evidence shows that the actual offense was committed by an employee.

Under our law if the owner knowingly and wilfully ordered or permitted the employee to commit such offense, we believe he would be equally guilty with the employee. In the matter of corporations and associations it is impossible for such organizations to commit a crime except through their agents and employees, and when such employee commits a crime while in the employment of the organization and in the interest of such organization, the organization is as guilty as the employee.

Where two or more persons are engaged in making the test, and the test is fraudulently made, each person who has knowingly aided and assisted in any way in making such fraudulnt test is equally guilty.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

SCHOOL OF PHARMACY—APPROVAL BY BOARD OF EXAMINERS

February 20, 1930.

Hon. Ernest M. Pollard,
Secretary, Department of Public Welfare,
State House,
Lincoln, Nebraska.
Dear Mr. Pollard:

In your letter of the 18th you ask for our opinion as to whether, when a school of pharmacy presents proof that it is maintaining the course of instruction required by Section 125 of Chapter 167, Laws of 1927, it is mandatory that the board of examiners and your department approve of such school.

It is our opinion that even though a school of pharmacy presents proof that it maintains the course of instruction prescribed by Section 125, it is not mandatory upon the board of examiners to recommend approval or upon your department to approve of such school. It is our understanding of the section that it merely undertakes to outline the minimum requirements of such schools of instruction, and that a school which does not meet these minimum requirements shall not be approved. If, however, your department, or the board of examiners, have reasons which are not merely arbitrary and capricious, for withholding approval of any school, even though it maintains the standards required by Section 125, we think you may withhold your approval and that the courts would sustain your action. In other words we think the legislature intended to vest a certain amount of discretion in your department and with the board of examiners in the matter of approval of such schools.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General,

OPTOMETRY—RIGHT OF OSTEOPATHS TO PRACTICE

November 22, 1930.

Hon. Ernest M. Pollard, Secretary,
Department of Public Welfare,
State House,
Lincoln, Nebr.
Dear Mr. Pollard:

You ask if a licensed osteopath may lawfully examine eyes and fit glasses and perform the other duties incident to the practice of optometry.

The Supreme Courts of California and Washington have held in comparatively recent cases that one licensed to practice osteopathy is not thereby authorized to practice optometry. See Ex Parte Rust, 181 Cal. 73, 183 P. 548; State v. Rust, 119 Wash. 480, 206 P. 33.

However, the question must be determined chiefly by the provisions of our Uniform Licensure Law and the construction to be placed on its provisions.

Section 118 of the Uniform Licensure Law (Chapter 167, Laws 1927) prescribe certain subjects which must be taught in all approved and accredited schools of osteopathy. One of these subjects is "eye ear, nose and throat, one hundred twenty hours." Section 119 provides: "Every license issued under this division shall confer upon the holder thereof the right to practice osteopathy in all its branches, as taught in the osteopathic colleges recognized by the American Osteopathic Association."

Section 111 of the same act defines the practice of optometry as follows:

> "1. Persons who employ any means other than drugs for the measurement of the powers of vision of the human eyes and adapt lenses for aiding the same.
>
> "2. Persons who allow the public to use any mechanical device for such purposes.
>
> "3. Persons who publicly profess to be optometrists and to assume the duties incident to said profession."

Section 112 of the act excludes from the provisions of the act:

> "1. Merchants or dealers who sell glasses as merchandise in an established place of business and who do not profess to be optometrists or practice optometry as herein defined.
>
> "2. Licensed practitioners of medicine."

Paragraph 3, Section 113, of the act requires that every applicant for a license to practice optometry shall:

> "3. Pass an examination prescribed by the Board of Examiners in subjects of theoretic optometry, theoretic optics, practical optics, anatomy and physiology and opthalmoolgy."

Construing the above quoted sections together, I am of the opinion that if the Osteopathic colleges recognized by the American Osteopathic Association give required courses in the subjects of theoretic optometry, theoretic optics, practical optics, anatomy, physiology and opthalmology, as are required to be studied by applicants for license to practice optometry, that licensed osteopaths are entitled to practice optometry.

Otherwise, I think osteopaths may not lawfully practice optometry as it does not seem to me that they are included under the 2nd exception found in Section 112 of the act, which appears to refer only to licensed physicians and surgeons.

Very truly yours,

C. A. SORENSEN, Attorney General,

By HOMER L. KYLE, Assistant Attorney General.

LAW ENFORCEMENT—STATE CONTROL OF LOCAL OFFICERS

February 3, 1930.

Honorable A. J. Weaver,
Governor of Nebraska,
Lincoln, Nebraska.
Dear Sir:

In your memorandum of January 24, 1930, you ask for a statement as to what extent "this state supervises and controls local law enforcement officers, such as prosecuting attorneys, sheriffs, judges, coroners, justices of the peace, constables and police."

Without going into a lengthy discussion of the subject we beg leave to call your attention to the following provisions of our constitution and statutes having a bearing on this subject.

Section 12, Article IV of the constitution empowers the Governor to remove any officer, whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office, and to declare the office vacant, etc. We think, however, that this provision would not apply to any of the officers mentioned in your memorandum.

Under section 5, Article IV of the constitution, all civil officers of the state are liable to impeachment for any misdemeanor in office.

Section 9712 to 9725 inclusive, Compiled Statutes of Nebraska, 1922, define certain forms of malfeasance of public officers such as those mentioned in your memorandum, the offenses being enumerated as extortion, usurpation, stirring up suits, oppression under color of office, suffering criminals to escape, suffering jail to become unclean, neglecting to serve warrant in felonies and misdemeanors, dealing with prisoners less severly than sentence warrants, corruption or palpable omission of duty, and prescribes penalties for such malfeasance. Conviction of neglect to serve warrants in criminal cases works a forfeiture of the office.

Section 9306 Compiled Statutes, 1922, provides:

> "Any county attorney or prosecuting officer, sheriff, police judge, mayor, police officer, or police commissioner or other officer who shall wilfully fail, neglect or refuse to enforce any law which it is made his duty to enforce shall thereby forfeit his office and may be removed therefrom."

The following section (9307), as amended by Chapter 116, Laws of 1923, provides that the attorney general or a special attorney designated by the Governor under sections 3281 and 4832, Compiled Statutes, 1922, when directed by the Governor, shall institute and prosecute quo warranto proceedings in the supreme court against any such county

attorney or prosecuting officer, sheriff, poice judge, police officer, or police commissioner, mayor or other officer, who holds his office by a vote of the people * * * and if the court shall find that such suspended officer has wilfully failed or refused to enforce any law which it is his duty as such officer to perform, then the court shall render judgment of ouster against such officer and the office shall thereby become vacant.

Section 5028, Compiled Statutes, 1922, provides:

> "All county officers, including justices of the peace, may be charged, tried and removed from office for official misdemeanors in the manner and for the causes following:
>
> "First. For habitual or wilful neglect of duty;
>
> "Second. For gross partiality;
>
> "Third. For oppression;
>
> "Fourth. For extortion;
>
> "Fifth. For corruption.
>
> "Sixth. For wilful maladministration in office;
>
> "Seventh. For conviction of a felony;
>
> "Eighth. For habitual drunkeness."

The next succeeding section (5029) provides that "any person may make such charge and the district court shall have exclusive original jurisdiction thereof by summons."

There are also certain special laws regarding the enforcement of the liquor laws. Among these are section 4833, Compiled Statutes, 1922, which provides:

> "In any case of emergency where the officials in any city or county who are charged with the enforcement of any of the laws of the state, refuse or fail to enforce the general laws, the Governor is hereby authorized to direct the persons appointed under the provisions of this act or under the provisions of the law relating to the prohibition of intoxicating liquors, to enforce the general laws of the state."

The "persons appointed under the provisions of this act", referred to in section 4833, are the state sheriff and his deputies appointed under section 4832, Compiled Statutes, 1922, as amended by Chapter 157, Laws of 1927.

Sections 3281 and 3282, Compiled Statutes, 1922 are as follows:

"It is hereby declared to be the duty of the governor to enforce all of the provisions of this act, and he may call to his assistance in enforcing the provisions hereof all of the powers of the chief executive officer of the state. He may direct the attorney general and all other officers of the state to enforce the provisions of this act, in any and all cases. He may call to his assistance any number of persons necessary to see that said law is enforced, including such special attorneys, assistants and clerks and provide quarters for them, as he may deem necessary, and may authorize any of them to perform any and all duties in the enforcement of this act and any person so authorized is hereby vested with all of the powers possessed by prosecuting and peace officers. He may contract for their services and they shall be paid out of the general funds of the state. He shall have the power to suspend any prosecuting or peace officer who shall fail, neglect or refuse to enforce the provisions of this act, and may direct the attorney general or any other prosecuting officer to bring proceedings for the removal from office of any such officer who fails, neglects or refuses to do his duty. And he shall prepare and furnish any and all forms, blanks, blank affidavits, blank statements that are provided for, or are necessary, to properly carry out the provisions of this act.

"The provisions of this section shall be held to be cumulative and not exclusive and shall not be construed to in any way relieve any local officer of his obligation and responsibility for the enforcement of the provisions of this act nor the enforcement of any ordinance or local laws relating to intoxicating liquors.

"The attorney general and his assistants and deputies and special attorneys provided for in this section shall have all the powers, rights and duties under this chapter as are possessed by county attorneys and other prosecuting officers, and where the term 'county attorney' or 'prosecuting officer' is used in this chapter it shall be deemed to include the said attorney general, his assistants, deputies and said special prosecuting officers. Any prosecuting officers herein mentioned may call a stenographer at his discretion to report any case and to transcribe the evidence thereof in a court not of record and the costs thereof shall be paid by the county board."

Section 3281.

"If any magistrate, county attorney, constable, policeman, sheriff, or other officer shall neglect, fail, or refuse to do his

duty in the enforcement of the provisions of this act, any citizen of the county, the county attorney, the governor, or the attorney general of the state may file a complaint in any district court in this state, setting forth specific charges of such neglect and refusal against any of the said officials. Said action shall be brought in the name of the state on the relation of the complainant. If the defendant shall be convicted he shall be ousted from his office, and a decree shall be entered accordingly, and if the case be appealed by the defendant the judgment of ouster shall not be superseded. The vacancy in such office so created shall be filled as provided by law. Either party may request that a judge be appointed from outside of the district by applying to the supreme court and said court shall make said appointment forthwith. The answer shall be filed within ten days from the filing of the complaint. The complaint and answer shall constitute the issues, and the trial shall be begun within twenty days of the filing of the complaint. The proceedings shall be summary in character, triable to the judge."

Section 3282.

Your memorandum also asks "if any other devices of supervision and control such as reports, advice, orders, investigation, grants in aid, etc. are use."

In this regard, in addition to the laws already mentioned, we beg leave to call attention to certain statutes relating to the enforcement of the prohibition laws, among which are Section 3262, Compiled Statutes, 1922, authorizing the county attorney or any citizen of the county to abate and perpetually enjoin nuisances in cases where liquor is being sold on certain premises; section 3271, Compiled Statutes, 1922, authorizing any county attorney, the attorney general or the Governor, when notified of violations of the liquor laws, to conduct an inquiry, take testimony for the purpose of securing evidence on which to base prosecutions; and section 3280, Compiled Statutes, 1922, requiring clerks of the district courts of the several counties of the state to report to the Governor every three months all actions pending for the violation of the liquor laws of the state, and where trial was had, a statement of the result and the fine or penalty imposed, if any.

We also respectfully call your attention to our letter to you written by Mr. Ayres of this department under date of October 24, 1929, relating to removal of city officials for alleged neglect of duty in which certain phases of the questions contained in your memorandum were considered and discussed.

Respectfully submitted,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

INJURY TO INMATE OF STATE INSTITUTION—LIABILITY OF STATE

June 25, 1930.

Hon. H. S. Thorpe,
Board of Control,
State House,
Lincoln, Nebraska.
Dear Sir:

This is in answer to your kind letter of June 23, 1930, requesting opinion as to the state's liability for damages, including doctor bills, hospital bills, X-ray bills or death, caused by alleged wilful or negligent misconduct of officers, agents or employees of the School for the Deaf at Omaha, causing or contributing to the injury of a student of said school while playing a competitive game of football or basketball with students of some other school in some other city.

The pertinent law appears to be the following:

> "The legislature has not by law granted to anyone the right to recover against the state damages for negligence of any of its officers, agents or employees, and, until such legislation is enacted, no recovery against the state can be had for such negligence."

Kent v. State, Neb., 225 N. W. 672.

Shear v. State, Neb., 223 N. W. 130.

Brownlee v. School District, Neb., 228 N. W. 937.

In view of this rule, a negative answer is, in our judgment, required to the questions you ask.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

FINES—DISPOSAL OF

April 5, 1929.

Mr. D. E. Purinton,
Alliance, Nebraska.
Dear Sir:

In answer to your letter of the 1st instant allow me to say that fines arising under the general laws of the state belong to and should be paid over to the counties respectively where the same may be imposd for the use and benefit of the public schools of the county and fines arising under the ordinances of cities and villages belong to and should be turned over to the respective cities and villages where they are imposed for the use and support of the common schools in such cities and villages. (See Section 5 of Article VII of the Constitution of Nebraska).

Respectfully yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

LIQUOR PROSECUTIONS—EXPENSES OBLIGATION OF COUNTY

May 7, 1929.

Mr. C. H. Hendrickson,
County Attorney,
Wayne, Nebraska.
Dear Sir:

This is in answer to your kind letter of May 4, 1929, requesting information as to whether in state criminal prosecutions in police courts the fees of a salaried chief of police are proper obligations of the county; also whether the cost of buying liquor for use as evidence in a liquor prosecution is a proper obligation of the county.

In cities of the second class including Wayne the chief of police in the police court thereof has the constable or sheriff's power including arrest, attendance at court, serving warrants and returning warrants (Compiled Statutes of Nebraska, 1922, Section 4179). Constables receive sheriff's fees for sheriff services, and the fees, taxed as costs in the case, as set forth in your letter are the sheriff's fees (Compiled Statutes, 1922, Sections 2401, 2381). In police courts, the magistrate taxes and collects the costs, including those of the chief of police when he is substituting for the constable or sheriff and turns them, not to the chief but to the city treasury (Compiled Statutes, 1922, Section 4408). The costs, including the chief of police's costs, in a county attorney's prosecution, are, if not otherwise collectable, the obligations of the

county (Compiled Statutes of Nebraska, 1922, Sections 2402 and 10274). From this obligation for sheriff, constable or policeman's costs, there is no exemption of the county because the officer, for whose services the costs are provided, happens to be salaried. When as above set forth, the costs for the chief of police get into the city treasury it is between the city and the chief whether he gets fees or a salary.

As to the $4.00 for the liquor-buy for use as evidence, it is the obligation of the county, if the county attorney incurred or approved it. But if the county attorney did not approve or incur it, then it is not the obligation of the county (3272, Compiled Statutes of Nebraska, 1922).

It is confidently expected that this answers your questions.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

COUNTIES—INVESTMENT OF SURPLUS FUNDS

June 19, 1929.

Mr. John L. Riddell,
County Attorney,
York, Nebraska.
Dear Sir:

We have your letter of the 12th regarding the depositing of county funds.

You ask whether a county treasurer may invest the funds of the county in United States government bonds in cases where the banks of the county are unable or refuse to put up security bonds for sums sufficient to cover the money now in the hands of the county treasurer.

In reply permit me to say that I am unable to find any authority for the investment of county funds in such government bonds.

Chapter 34, Session Laws, 1927, amending Section 6193, Compiled Statutes, 1922, provides:

> "Where banks located in the county refuse or neglect to bid on said money, or where there are not banks in the county, or where the banks located in the county have not sufficient capital stock and surplus to receive said money under this article, then any surplus over the amount herein specified that banks in the county may receive shall be deposited in banks outside of the county having sufficient capital stock and surplus under the same conditions and terms as if in the county."

Chapter 34, Session Laws, 1927, from which the above is quoted is

amended by Chapter 36, Session Laws, 1929, but the provision above quoted remains. This is the only provision I find applying to such circumstances as you mention, and it appears to be the only proper method of handling the surplus funds of the county.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

PATENT MEDICINES, ETC.—SALE OF

July 6, 1929.

Wiggs Variety Store,
Havelock, Nebraska.
Gentlemen:

We have your letter of June 26th in which you ask if it is lawful for a variety store to sell aspirin, iodine, mercurochrome, peroxide, laxative tablets, salves, camphorated oil, spirit of camphor, salts, castor oil, patent cough medicines, tonics, glycerine, etc.

Your question is doubtless prompted by the opinion of our Supreme Court in the case of State v. Geest, decided June 4, 1929, in which it was held:

> "In so far as Chapter 167, Laws 1927, limits to license pharmacists the sale of all articles listed in the United States Pharmacopoeia or National Formulary, it transcends the police power and is invalid."

In this case it was especially held that aspirin may be sold by persons who are not licensed pharmacists. The same rule would appear to apply to some of the other articles which you mention, such as peroxide, salves, camphorated oil, spirit of camphor, salts, castor oil, and glycerine.

The law which the Supreme Court in the Geest case declared unconstitutional repealed Section 8212, Compiled Statutes of Nebraska, 1922. By holding the new law unconstitutional the Supreme Court, in effect, held that Section 8212 was still in force. Section 8212, Compiled Statutes of Nebraska, 1922, provides as follows:

> "Any person not being a registered pharmacist, who shall take charge of or act as a manager of such pharmacy or store, or who, not being a registered pharmacist shall retail, compound or dispense drugs, poisons or medicines of any kind, or any person violating any provisions of this article to which no other penalty is herein attached, shall be deemed guilty of a

misdemeanor, and for every such offense, shall, upon conviction thereof, be punished by a fine of not less than ten days nor more than ninety days. Nothing in this article shall be construed to prohibit a registered pharmacist from employing an apprentice in pharmacy."

Whether or not it is lawful for a person who is not a registered pharmacist to sell the article you mention would depend upon whether or not such articles can be properly classified as "drugs, poisons or medicines of any kind" under the provisions of 8212, Compiled Statutes of Nebraska for 1922 above quoted. It is true that a definition of "drugs, poisons, and medicines" might be made which is broad enough to include all the articles you mention, but from the language of the Supreme Court in the Geest case we believe the Court would limit such definition to include only articles which are poisonous, dangerous or deleterious to the public health or safety.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

TAX SALES—ADVERTISING FEE—DESCRIPTION OF LAND.

September 20, 1929.

Mr. Orville C. Wisdom,
County Attorney,
Kimball, Nebraska.
Dear Sir:

This is in answer to your kind letter of September 13, 1929, requesting an opinion as to whether under Laws, 1929, Chapter 170, Pages 583-4, the publisher receives the whole thirty cents provided for the expenses of advertising lands for sale for delinquent taxes; and as to what constituting a "description of land" within the meaning of said law.

It is true by the terms of the law, the said sum of 30 cents is provided to defray the expense of advertising. But this is only a maximum rate, and if a lower rate for publishing the delinquent tax notice has been agreed upon with the publisher, he is entitled only to agreed rate.

Wisner v. Morrill, 220 N. W. 280.

The thirty cents is to be added "to each description of land." The "description of land" the county treasurer gets from the assessment books made up in April by the county clerk as provided by Section 5956, Compiled Statutes of Nebraska, 1922. By this law the rules for listing a "description of land" for revenue purposes are stated as follows:

"When a whole section, half section, quarter section or half quarter section belongs to the one owner, it shall be listed as one tract, and when all lots in the same block belong to one owner, they shall be listed as a block. When several adjoining lots in the same block belong to the same owner, they shall be included in one description. When any tract or parcel of real estate is situated in more than one township, precinct, school, road or other district, the portion thereof in each shall be listed separately."

We now proceed to apply the above rule for determining a "description of land" to the situations set forth in your letter.

"Where the description is as follows: The north half and the South West quarter of Sec....., T....., N. R....." and it all belongs to the same owner, the sum of thirty cents, not sixty cents, should be added to that description.

Where the same owner has 3 adjoining lots in one block and 3 adjoining lots in another block, the two tracts being in the same addition but not adjoining, it, is our opinion that one charge of 30 cents may be against such real estate or tracts unless the two tracts are in different townships, precincts, school, road or other districts. By Section 5956, Compiled Statutes of Nebraska, 1922, above quoted, one description is provided for adjoining lots in the same block owned by the same person. But one description for lots of the same owner in different blocks is not prohibited. Hence, we regard the statutes as directory in this respect.

Where a number of separate descriptions of land or lots are assessed to one person, that is the tax receipts contains a number of descriptions, 30 cents will be added to the land in each township, precinct, school, road or other district.

Through the county clerk, who makes the assessment books (Sec. 5956) and therefrom transcribes the tax list (Sec. 5982), the county treasurer gets his descriptions of land (Sec. 5984). Hence, the information you request and herein given is mostly available to the county clerk.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

COUNTY ATTORNEYS—DUTIES—HIGHWAY CONDEMNATION CASES

August 29, 1929.

Mr. C. S. Beck,
County Attorney,
North Platte, Nebr.
Dear Sir:

In answer to your letter of inquiry I will say that in my opinion either the attorney general or the county attorney of the county in which the land is located may bring proceedings at the request of the Department of Public Works for the condemnation of land for a state highway.

I take it that Section 4913, Compiled Statutes, which among other things makes it the duty of the county attorney to "prosecute and defend, on behalf of the state and county, all suits, applications or motions, civil or criminal, arising under the laws of the state, in which the state or the county is a party or interested," clothes the county attorney with power and makes it his duty when requested to do so, to appear on behalf of the state in a condemnation proceeding instituted in his county to condemn land for a state highway.

I think the Department of Public Works usually asks and obtains the assistance of the county attorneys of the respective counties in such matters. Of course this office stands ready to advise with the county attorney and to cooperate with him in these matters if it becomes necessary to do so.

Very truly yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

SCHOOL DISTRICTS—LIABILITY FOR DEFECTIVE SWING

April 16, 1929.

Superintendent M. R. Mortensen,
Long Pine Public Schools,
Long Pine, Nebraska.
Dear Sir:

This is in answer to your kind letter of April 4, 1929, requesting information as to the liability of your school district for personal injury to a pupil caused by the breaking of a defective swing belonging to the school and used by the pupil.

Liability of the district would, of course, have to rest on some fault or negligence of the district, its agents and servants, in maintaining

the defective swing. Our Supreme Court has only recently held that in the absence of a statute making it liable the state is not liable for the negligent acts of its agents and servants (Shear v. State, 223 N. W. 130). The same rule applies to political subdivisions of the state including school districts (36 Cyc. 971, Notes 75 to 81). In Nebraska there is no statute making school districts liable for the negligence of their agents and employees. These rules were applied in favor of the school district in the recent case of Brownlee v. School District, pending in the District Court of Lancaster County, wherein a janitor left a loose radiator standing in the hall of the school building and one pupil in play pushed the radiator over on another pupil and injured him.

It is, therefore, our opinion that your school district is without liability in the premises.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

PENSION MONEY—EXEMPTION FROM TAXATION

April 19, 1929.

Mary Douglas,
Burkett, Nebr.
Dear Madam:

This is in answer to your kind letter of April 7, 1929, requesting information as to whether property purchased with pension money is exempt from taxation.

Such property in part is exempt from levy and execution but not from taxation. In Nebraska the only property exempt from taxation is $200 household goods; educational, religious, charitable and cemetery property; property of agricultural and horticultural societies; and property of the state and governmental subdivisions. (Sections 5821, Compiled Statutes of Nebraska, 1922).

In view of the rule that statutes excluding property from taxation are to be strictly construed it is our opinion that property purchased with pension money is not exempt from taxation. (See Y. M. C. A. v. Douglas County, 60 Neb. 642).

Sincerely yours,

C. A. SORENSEN, Attorney General.

TAXATION—EFFECT OF ASSIGNMENT OF PERSONAL PROPERTY

May 23, 1929.

Honorable C. G. Perry,
County Attorney,
Bridgeport, Nebraska.
Dear Sir:

This is in answer to your kind letter of May 21, 1929, requesting information as to whether a tax payer, who, on April 1, 1925, listed his stock of merchandise for personal taxation, and thereafter assigned the property for the benefit of creditors, is exempted from paying the personal tax thereon because not levied on in his hands.

It is our opinion that personal property taxes are the personal obligation of the taxpayer. They would date from the time that the personal property was assessed or in other words from the time that they were listed for taxation on April 1, 1925. The fact that the county obtains additional security for the tax by making a levy some time in August and acquiring a statutory lien on the property in November, does not, in our opinion, relieve the tax payer from his personal liability for the tax. The personal liability of the tax payer, the levy and the statutory lien are, in our judgment, cumulative provisions for the benefit of the county in collecting personal taxes. It is therefore our conclusion that the tax payer, referred to in your letter, is personally obligated to pay taxes on the personal property described in your letter and listed and assessed for taxation on April 1, 1925, regardless of what he may have done thereafter with said property.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

STATE OFFICERS—PREMIUM ON BONDS—HOW PAID

May 22, 1929.

State Auditor L. B. Johnson,
State House,
Lincoln, Nebraska.
Dear Sir:

You ask if the cost of a state officer's bond may be paid out of the maintenance fund appropriated for that office.

In our opinion the cost of the bond that each state officer must file cannot be paid out of the maintenance fund appropriated for said office except when and to the extent provided by law. Where the law is silent

on the subject and no specific appropriation has been made, no right in our opinion exists to pay such expense out of the maintenance fund.

Very truly yours,

C. A. SORENSEN, Attorney General.

BANKS—CHILDREN'S DEPOSITS—SET-OFF

October 28, 1930.

Mr. Victor Blixt,
Stapleton, Nebraska.
Dear Sir:

Answering your inquiry of October 17 as to the application by the receiver of an insolvent bank of savings accounts of the children upon a note of the father to the bank, we would say that such application is unauthorized if the ownership of the deposit has been brought to the bank's attention either by actual mention of such children's names when the deposit was made, or otherwise, prior to the time of such application. In other words, even though the father had the right to withdraw such deposits, the bank, by its notice of the actual ownership thereof is charged with the nature of the rights of such owners who, though minors, are entitled to hold and own property in their own right.

Of course there may be other facts which may throw a different light on this question and we would suggest that you see your local attorney at once concerning the matter. The case is probably governed by the holdings in: Nehawka Bank v. Ingersoll, 2 Neb. (Unof.) 617, 89 N. W. 618; Globe Savings Bank v. National Bank of Commerce, 64 Neb. 413, 89 N. W. 1030. In the case last mentioned it was held:

> "A bank has the right to appropriate the funds of a depositor to the extent of the indebtedness due from him; but if the deposit, or any part thereof, is a trust fund, and the bank has notice of this fact, it will be liable to the true owner if it appropriates such fund to the discharge of an indebtedness due from the depositor."

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

BANKS—INSOLVENCY—ASSIGNMENT FOR CREDITORS—STATUTORY PROVISIONS

November 6, 1930.

Mr. M. H. Leamy,
Attorney at Law,
Pierce, Nebraska.
Dear Sir:

I have examined authorities cited by you upon the question of the right of an insolvent state bank to make an assignment of all its assets to a trustee for the benefit of its creditors, and am of the opinion that in the absence of any statute governing the matter it has the right at common law. Thus it is said:

> "The right of a debtor to make an assignment for the benefit of creditors exists at common law as a corollary to the legal axiom that the power to dispose of property as one may see fit, where unrestricted by statute, is a necessary incident to the ownership of property. In modern times assignments by debtors are regulated to a great extent by statutes in many jurisdictions. Some of these statutes merely require the performance of certain formalities to give effect to an assignment, such as that it shall be recorded; that it shall be accompanied by an inventory of the assigned property, or a schedule of the assignor's debts; that the assignee shall file a bond, etc.; while others go to the extent of placing the assignment and the conduct of the estate entirely under the supervision of the court, so that the custody of the assigned property is considered as being not in the assignee, but in the court, and the entire assignment assumes the nature of a judicial procedure."—2 R. C. L. 644.

In this state Sections 10, 11, and 12 of Chapter 36, Session Laws of Nebraska for 1929, outline the procedure to be followed in closing up the affairs of an insolvent state bank. In such a case the assets of the bank are placed in the hands of the Secretary of Trade and Commerce as receiver and the law specifically states that "liquidation shall thereafter be had under order of court in the manner provided by law."

In view of this statutory provision, I doubt the right of the Secretary of Trade and Commerce as a matter of strict law to consent that such assets shall be turned to a trustee who is selected neither by himself nor by the court. It may be the incoming legislature if asked to do so, will authorize the method of settlement you suggest.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

BANKS—COUNTY FUNDS—SECURITY FOR

June 4, 1929.

Mr. Frank H. Stubbs,
County Attorney,
Superior, Nebraska.
Dear Sir:

Speaking with reference to House Roll No. 7 passed at the last session of the Legislature which provides for the deposit of securities to secure the deposit of county funds in banks, you inquire:

> "In the event the banks choose to deposit U. S. Government Bonds or other securities with the County Clerk and in the event such securities should be stolen or lost through the neglect or tortious act of the County Clerk or otherwise, is the County to be held responsible for the amount of such securities that might be lost or destroyed or misapplied?
>
> "Again, is there provision that you know of that the County Commissioner could require the County Clerk to increase his bond, or to give any new bond to cover his liabilities as custodian of securities deposited with him under the provisions of House Roll No. 7?
>
> "Again, if the bankers of this County are not inclined to furnish either bonds or securities in order to obtain County deposits and if no one outside of the County cares to make the necessary bond or deposit of securities, what will be expected of the County Treasurer under such circumstances insofar as the safe keeping of the funds of the County is concerned?
>
> "Again, would the County Commissioners be authorized to pay the surety bonds of the depository banks in this County in the event the banks decline to put up bonds or securities to obtain the deposits? The banks say that the cost of surety bonds is so high that it is doubtful whether they should be justified in paying the cost of such surety bonds and paying 2% interest on the average daily deposits.
>
> "Is it compulsory for the depository banks to pay 2% on County deposits?"

I will endeavor to answer the above questions in the order in which they are asked.

1. I do not believe the County would be liable if securities deposited by banks with the County Clerk should be lost through the neglect or tortious act of that officer.

2. I do not know that the official bond of the County Clerk, having already been fixed by the County Board, could be increased at this time, possibly it could be but in no event could it be increased above ten thousand dollars for that is the maximum amount fixed by law.

3. The County Treasurer will be required to keep the County money safe.

4. I know of no authority of law for paying the premium, with county money, on a bond given by a bank to secure a deposit of County money with it. I am of the opinion that the County Board had better pay the premium on an increased bond for their County Treasurer than pay the premium on a bank depositary bond given to secure a deposit of County money in the bank. There is warrant of law for paying the premium on the treasurer's bond. There is none for the other course.

5. I find no provision of statute which in express terms relieves banks in which County money is deposited from paying at least two per cent interest on such deposits, but in my opinion the circumstances may be such that a bank will not be required to pay interest on such a deposit.

> "The treasurer of H. county purchased, with county funds which he was unable to place in depository banks, with the approval and authority of the county board, and for the sole purpose of obtaining a safe place in which to keep the public money, noninterest-bearing demand certificates of a bank which in good faith had refused to qualify as a depository under the provisions of article 111, ch. 18, Comp. St. 1903. The certificates were treated and used as cash by the treasurer in transacting the county business and were paid in full on demand. Neither the treasurer nor the bank in any manner profited by the transaction. Held, that the bank was not liable to the county for interest upon the public money with which the certificates were purchased." (Hamilton County v. Aurora National Bank, 88 Neb. 280).

In the case of Hamilton County v. Cunningham, 87 Neb. 650, it was held that

> "A county treasurer is not liable on his bond for interest which he has not collected and has been unable to collect upon the public funds in his care, unless it appears that some act or

neglect of his has prevented or hindered the collection of such interest."

Respectfully yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

CITIES AND VILLAGES—HYDRO-ELECTRIC PLANTS OUTSIDE VILLAGE LIMITS

March 5, 1930.

Elfie Hanson, Superintendent,
Burwell Municipal Plant,
Burwell, Nebraska.
Dear Sir:

In answer to your inquiry of March 3, 1930, we would say that your municipal plant is authorized by law to construct a hydro-electric plant, if necessary, outside the village limits. We refer you especially to Sections 4394 and 4395, Compiled Statutes of Nebraska, 1922, authorizing such action.

The village should make application for appropriation and permit to the Department of Public Works. You should communicate with that department concerning the same.

As to appropriation of water of a stream flowing through private property by such private owner, we see no legal objection to the same if he desires to build a dam for irrigation and power purposes, but he should have a certificate from the Department of Public Works establishing his rights of priority in such use. We refer you to Sections 8410 and 8426 to 8439, inclusive, Compiled Statutes of Nebraska, 1922.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

CITIES AND VILLAGES—SUPPORT OF POOR—ALLOCATION BY COUNTY TREASURER OF TAX RECEIPTS TO VILLAGE FUNDS

May 22, 1930.

Mr. A. E. Camblin,
Stella, Nebraska.
Dear Sir:

This is in answer to your kind letter of May 17, 1930, requesting information as to whether it is legal for a village board to pay money

out of the general fund to help support the poor of the town; also as to whether it is the duty of the county treasurer to separate the taxes collected into the different funds as levied—if it isn't his duty, whose duty is it.

As to your first question, the rule appears to be well settled that municipal funds may be expended for any lawful municipal purpose (44 C. J. 1160, Note 46). The question is whether the support of the poor is a lawful village purpose. There is no Nebraska statute specifically imposing upon the village the duty to care for the poor within its limits. Instead, Section 5143, Comp. Stat. 1922, definitely places upon the county board the obligation to support all paupers of the county including villages and cities in the county. The material part of Section 5143 reads as follows:

> "The county board of each county shall be the overseers of the poor and are vested with the **entire** and **exclusive** superintendence of the poor in such county."

That the village may lawfully exercise a function which is thus exclusively delegated to the county is open to grave doubt. This doubt is confirmed by many expressions of general law on the subject of paupers. Thus, at 21 R. C. L., Pages 701 and 703 we find the following:

> "There is no legal obligation at common law on any of the instrumentalities of government to furnish relief to paupers. The obligation to support such persons results only from statute * * *. Society looks to no ulterior or contingent advantage from the support of the poor. They are supported for their own good exclusively, and simply because humanity impels us to relieve their necessity. The case is entirely different from cases of affliction, such as insanity, blindness, or deafness and dumbness, for there a real public advantage is at stake in the cure of such persons, or in their education so as to overcome their physical handicaps * * *. The care of the poor is usually delegated by the state in its constitution or by statute to some subdivision thereof, sometimes the county, the township, or other district, and when so delegated it becomes the duty of the subdivision **alone.** So where the state constitution provides for the care of the poor by the counties, or other subdivision, the state cannot establish and maintain a poorhouse of its own."

These principles are also expressed in State v. Hallock, 14 Neb. 202, Wood v. Boone County, 153 Ia. 92, 133 N. W. 377, and Cerro Gordo County v. Boone County, 152 Ia. 692, 133 N. W. 132.

The above expressions of the law all tend to enforce the conclusion that the care of the poor being delegated to the county is beyond the

power of the village which is without authority to expend its funds for such purposes.

However, this is a question upon which the Supreme Court of this state has never passed. Our statute, namely Section 4229, gives the village power to pass ordinances for the public welfare of the village, its trade, commerce and manufactories. It requires no great stretch of the imagination to perceive that the giving of relief to a poor man of the town, contributes to the public welfare of that man's part of the town and may give him the strength to make important contributions to the welfare of everybody else, or at least many other persons in the town. This in our judgment is a consideration which makes very strong for the power of the village to incur a reasonable expense from its general fund to support paupers in the village.

But as stated above the Supreme Court of Nebraska has not decided this question and what its decision might be when the question comes before it we, of course, do not know and cannot say.

In answer to your second question we fail to find any law requiring the county treasurer to distribute village taxes to the various village funds, and we are, therefore, of the opinion that this duty devolves upon the trustees of the village who are vested by law with the general government of the village (see Secs, 4369 and 4224, Comp. Stat. 1922).

Generally speaking it is discretionary with the board as to what purposes it will spend its general fund for and into what subsidiary funds it will divide its general fund.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

OCCUPATION TAX—CITIES AND VILLAGES—CREAMERIES

October 21, 1930.

Mr. H. G. Keeney, President,
Farmers Educational and Co-operative Union,
11th and Jones Streets,
Omaha, Nebraska.
Dear Mr. Keeney:

Yours of October 17, 1930, at hand and contends noted.

You inclose a printed copy of Ordinance No. 76 of the Village of Arcadia, Nebraska. This is an ordinance levying an occupation tax on

certain occupations and lines of business carried on in Arcadia. It appears from your letter that your correspondent, S. V. Hansen of Arcadia, desires my opinion as to the legality of this ordinance. You do not state upon what particular feature of the ordinance the information is desired. But I assume Mr. Hansen is particularly interested in the clause imposing a tax of $5.00 per year on each creamery company doing business in Arcadia but not operating or maintaining a manufacturing plant in that village.

Section 4287, Compiled Statutes of Nebraska, 1922, provides that second class cities and villages may "raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city or village and regulate the same by ordinance." This law is, therefore, the general legal authority of the village for adopting and enforcing the ordinance you submit. The only serious question is whether there is illegal discrimination in taxing creamery companies doing business in Arcadia but not having a manufacturing plant therein and leaving untaxed the creamery companies, if any, having a manufacturing plant in the town. I fail to find any Nebraska statute or Nebraska Supreme Court decision which answers this precise question. However, in 37 Corpus Juris, 205 and 206, Note 68, the general rule is stated as follows:

> "The mere fact that license taxes are imposed upon non-residents does not make the taxes invalid if they apply alike to all in the same situation and there is no discrimination against the non-residents in favor of residents engaged in the same class of business."

It is plain, of course, that both resident and non-resident proprietors may own creamery companies doing business in Arcadia but having no manufacturing plant therein. Hence, the classification made by the ordinance of creamery companies having and not having manufacturing plants in the village, does not discriminate between residents and non-residents of Arcadia. No other possible constitutional objections to this classification is apparent. It seems to be nothing more than leaving Arcadia "producer" concerns untaxed while taxing Arcadia "middleman" concerns. This has been upheld as a valid classification (Hughes v. Detroit, 217 Mich. 267, 187 N. W. 530). It is, therefore, my opinion that both the ordinance in general and the creamery provision in particular are valid.

Appreciating the high value of your continued interest in the work of this office and with kind personal regards, I am

Sincerely yours,

C. A. SORENSEN, Attorney General.

CITIES AND VILLAGES—ILLEGAL CONTRACTS WITH CITY OFFICERS

November 29, 1930.

Mr. C. B. Dean,
Village Clerk,
Memphis, Nebraska.
Dear Sir:

This is in answer to your kind letter of November 26, 1930, in which you state and inquire:

> "Can a member of a village board work and draw pay from the town? Can a member of a village board sell and collect for merchandise sold to the town?"

Under Section 4326, Compiled Statutes of Nebraska, 1922, members of the town board are forbidden to be interested in any manner in contracts with the board. An injunction will lie to restrain the board from employing or buying merchandise from any of its own members. However, if the board does employ or buy merchandise from any of its members and receives the benefit of the services or merchandise of any of them, the board members furnishing the labor or materials may recover from the village the reasonable value thereof (Grand Island Gas Co. v. West, 28 Neb. 852; McElhinney v. Superior, 32 Neb. 744).

With kind pesonal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

CITIES AND VILLAGES—REMOVAL OF OFFICERS

August 6, 1929.

Mr. Richard B. Johnson,
Attorney at Law,
Havelock, Nebraska.
Dear Sir:

You inquire:

> "Has a Mayor of a city of the second class the power to remove the Chief of Police from that office, without the consent of the City Council?
>
> "Has the Mayor the power to fill the vacancy made so by

the removal of the Chief of Police, notwithstanding the City Council has failed to confirm the appointment?

"Has the Mayor the power to appoint an extra policeman where an emergency has arisen?"

I will endeavor to answer the above questions in the order in which they are asked.

1. The mayor has power to remove the chief of police without the consent of the council. The chief of police, of course, is a police officer and Section 4168, Compiled Statutes as amended by Chapter 36, Session Laws of 1925, provides among other things that

"All police officers appointed by the mayor and council shall be removable at any time by the mayor."

In the case of Mead v. State, 73 Neb. 75, it was held in effect by the Supreme Court in construing the above quoted provision of statute that the mayor could remove the chief of police without the consent of the city council.

2. In case of a vacancy of the office of chief of police the mayor may appoint some one to fill that office temporarily, but I do not believe he has power to fill that office permanently without the consent of the city council.

3. I am of the opinion that the mayor may appoint special (extra) policemen in case of an emergency.

You also inquire

"Will you also kindly advise the proper action to be taken to oust the Chief of Police who has refused to surrender his office and who would be the proper party to maintain such an action?"

In answer to this question I will say that the right of the chief of police, removed by the mayor, to hold the office may be tried out, in my opinion, by an action in quo warranto. The information in such a case may be filed by the county attorney (See Sections 9280 and 9281, Compiled Statutes of Nebraska, 1922).

Yours truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

TAXATION—TOWNSHIPS—ROAD FUND DISTRIBUTION

January 21, 1929.

Mr. A. A. Koepnick,
Bancroft, Nebraska.
Dear Sir:

We have your letter of the 16th in which you ask for our construction of the provision which you quote from Section 2795, Compiled S atutes for 1922 as amended by Ch. 46, S. L. 1923, I am of the opinion that your construction of this language is correct, viz., that where a township contains a city or village within its boundaries all money collected as road tax on property within the corporate limits of such city or village shall be paid in the first instance to the town board, but the town board shall then pay over to the treasurer of such city or village in cash one-half of such money so collected, to be used by the city or village for the maintenance and repair of streets and alleys of such city or village. In other words one-half of the money collected by the township from the city or village for road purposes is to be used by the township itself, the other half is to go to the city or village for maintenance and repairs of streets and alleys.

I note that you request that our opinion be written at the bottom of your letter. Inasmuch as it is the policy of this office to retain all communications sent to it, I am having a copy of your letter made which is enclosed herewith.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

AUTOMOBILES—REGISTRATION—RESIDENCE

August 8, 1929.

Edith M. Johnson,
Weeping Water, Nebraska.
Dear Madam:

From your kind letter of August 4, 1929, it appears that during the school months you teach, live and vote in Lincoln, Lancaster County, Nebraska, and during the vacation months you live in Weeping Water, Cass County, Nebraska, where you keep your car. You inquire as to whether you should obtain your automobile driver's license in Lancaster or Cass County.

The law (Laws 1929, Chapter 148, Sections 1, 2 and 3, Pages 512-13) contemplates that each auto driver should obtain his license in the county of his residence. In law residence is a matter of intention and

while no person can have two residences at the same time, he may have more than one residence at different times. Thus through the school months of the year your residence may be in Lancaster County and in the vacation months your residence may be in Cass County. If you intend to have it so, no one can dispute what you intend. Furthermore, the law does not seem to concern itself particularly with what county the license is obtained in, so long as the license is actually obtained; the important thing is to get the license in some county.

It is, therefore, our opinion that if your residence is in Cass County with your car at the time your license must be obtained, then you may obtain it in Cass Conuty. But if you are actually a resident of Lancaster County with your car at the time your license must be obtained, then you should obtain it in Lancaster County. Since the county of the automobile license would be some evidence of residence in these matters, the driver's license ought in every case to be obtained in the county where the automobile license was issued.

Yours truly,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

CITIES AND VILLAGES—ORDINANCES—PUBLICATION, APPROVAL, ETC.

September 6, 1929.

Mann & Whitten,
Special Counsel, City of Havelock,
514 Federal Trust Building,
Lincoln, Nebraska.
Gentlemen:

In your letter of September 5th you submit the following statement of facts and queries:

> "Some three years ago, the ordinances of said city being in chaotic and unsatisfactory condition, it appeared necessary that the same be revised. According to said records a revision of said ordinances was carried out in which it was attempted to replace the old ordinances of the city by enacting fifty new and independent ordinances covering various subjects of legislation, together with a 'General Revision Ordinance.' There exist certain questions as to the validity of one of the meetings said to have been held for revision purposes, but the same are not material to this inquiry.

"In attempted compliance with the statutes of this state, original copies of the new ordinances were prepared for the Clerk's record, together with a record of the jurisdictional steps relative to passage and approval of the same. However, none of said original ordinances in the city records were ever signed by the Mayor, nor is there any attestation by signature of the City Clerk and seal of said city, nor are the minutes signed at any place by the City Clerk. The terms of both the Mayor and City Clerk in office at the time of revision have expired. In every case the ordinances in question contain a provision that they shall be in force and take effect 'from and after their passage, approval and publication according to law.'

"Said ordinances were published in pamphlet form. Both said pamphlet and the original record in the office of the City Clerk show that said ordinances are alleged to have been passed on the 16th and 22nd days of July, 1926. The affidavit of publication of the printer, reproduced in said pamphlet, shows that publication was made on September 17, 1926.

"Query: Does the failure of the Mayor of said city to indicate his approval of said ordinances by signing the same, render them invalid? In this connection we call your attention to the clause above quoted and to the following Nebraska cases: Rooney vs. South Sioux City, 195 N. W. 474; South Sioux City Bridge Company vs. South Sioux City, 199 N. W. 528; Beverly Land Company vs South Sioux City, 219 N. W. 385.

"Query: Does the failure to publish said ordinances within one month after their enactment invalidate the same? In this connection we respectfully call your attention to the provisions of Section 4328, C. S. N., 1922, and to the fact that said Section authorizes publication in pamphlet form but says nothing which appears to indicate that the requirement that publication be had in one month does not apply in such cases.

"Query: What effect on the validity of said ordinances is caused by the failure of the City Clerk to attest the same by his signature and by the seal of the city, and, especially, by the failure of the City Clerk to sign the ordinances minutes?"

We have examined the cases cited in your letter and believe that they decisively establish the proposition that the city ordinances in the case described in your letter were void because not approved by the mayor. Certainly they have no effect until approved and signed by the mayor.

You say that the term of the then mayor has expired. If we can

assume that he is no longer mayor there seems to be no question but that it is now impossible ever to give life to these ordinances. If, however, he has been re-elected, there might be a question, should he undertake to give his approval at this time. It seems to us, however, that it was the intent of the legislature that ordinances requiring the approval of the mayor must be approved during the term of the mayor under whom they were passed and not at a subsequent term.

Answering your second query, we think it is essential to the validity of an ordinance that it be published within one month from the date of its passage in one of the ways prescribed by Section 4328, Comp. St. 1922. Municipal corporations are purely creatures of statute and derive their powers entirely from the legislature, and it is essential that those powers be exercised in substantial compliance with legislative requirements.

It is our opinion that where the statutory publication is intended to be made by issuing ordinances in book or pamphlet form that such book or pamphlet must be dated and issued within one month from the date of passage of such ordinance.

The answer to your third query has a bearing on our answer to the second query.

Section 4328, Comp. St. 1922, provides that: "The passage, approval and publication or posting of such ordinances shall be sufficiently proved by a certificate under seal of the city or village from the clerk thereof, showing that such ordinance was passed and approved, and when and in what paper the same was published, or when and by whom and where the same was posted up."

Section 4330, Comp. St. 1922, provides:

> * * * "all such ordinances may be approved by the certificate of the clerk, under the seal of the city or village," etc.

The purpose of these provisions is to furnish a method by which the validity and authenticity of the ordinances may be established in court without resorting to the cumbersome methods required by the ordinary rules of evidence. We do not believe that the validity of the ordinance is dependent on its being signed and witnessed by the city clerk and bearing the seal of the city, but when these acts are not performed it is without the presumption of validity and must be proved like any other fact.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

WORKMEN'S COMPENSATION LAW—HEARINGS—DEPUTY COMMISSIONERS

September 24, 1929.

Honorable Frank A. Peterson,
City Attorney,
Lincoln, Nebraska.
Dear Sir:

Speaking with reference to the duties of the Compensation Commissioner, Section 3076, Compiled Statutes provides among other things that "To aid him in the discharge of his duty he is hereby authorized to appoint a chief deputy compensation commissioner who shall serve for a period of two years from the date of appointment and until his successor is appointed and qualified. * * * The chief deputy compensation commissioner shall succeed to the powers and discharge the duties vested in the compensation commissioner."

Section 3079, Compiled Statutes, provides among other things that "The compensation commissioner may employ such assistants as may be necessary to carry out the provisions of this act."

Section 3062, Compiled Statutes, speaking with reference to a hearing in the first instance upon a claim made for compensation under the provisions of the "Workmen's Compensation Law," says: "At the expiration of the time fixed for filing the answer the compensation commissioner, or one of his assistants, shall proceed to hear all parties at interest and make such recommendations and awards as such compensation commissioner may be authorized by law to make."

It must be conceded, then, I think, that there is statutory authority for having the first hearing in a workmen's compensation case held either before the compensation commissioner or before his chief deputy or before an assistant in his office. The only question then, is as to the manner of acting and the general rule seems to be that:

> "When any act is performed by a deputy, the authority to do which he has solely by reason of the fact that he is such deputy, the act may always be done, and usually must be done, in the name of his principal, and where the act done is the signing of some instrument and the deputy signs the name of his principal, the act is the act of the principal and binds him and all the parties concerned as fully as if it had been signed by the principal, even though the name of the deputy actually signing it is not added."

Applying the rule of law above laid down to the situation in rehearing on claims in compensation cases, I am of the opinion it will be proper for either the chief deputy compensation commissioner or an

assistant compensation commissioner to sign the name of his chief to any findings or award he may make, and then to add "By....." (signing his own name).

You will note that the orders, awards and proceedings of the compensation commissioner are certified with his official seal. (Section 3079 Compiled Statutes).

I will add that I would not regard it as a fatal error if the chief deputy compensation commissioner should sign his own name without that of his chief to any order made by him and the same thing may be true in the case of an assistant compensation commissioner, but in any event, it is proper for either one to sign the name of his chief to an order he is authorized by law to make for and on behalf of his chief, provided he shows by a proper notation, just who does sign his chief's name.

Respectfully submitted,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

INTANGIBLE TAX—CORPORATIONS—EXEMPTIONS

September 8, 1930.

Mr. Harry W. Scott,
State Tax Commissioner,
Lincoln, Nebraska.
Dear Mr. Scott:

This is in answer to your kind letter of August 29, 1930, in which you state and inquire:

> "Several brothers and sisters who have quite a bit of money desire to incorporate a holding company and invest their money in municipal bonds, which if owned by an individual are exempt from taxation.
>
> "The intangible tax law being House Roll 421, Session Laws of 1929, provides that the basis for taxation of a Nebraska corporation shall be the value of the paid up capital stock, surplus and undivided profits. Inasmuch as all of this property would consist of municipal bonds, would it be your opinion that these bonds would be exempt from taxation and also the capital stock of the company just the same as if the bonds were owned by an individual, or would it be your opinion that the capital stock of the company would have to be taxed at eight mills on the dollar with no deductions?"

The eight-mill tax is on the valuation. The valuation of domestic corporations is the actual value of capital, surplus and undivided profits less the assessed value of its domestic property and the actual value of its foreign property. The capital stock, surplus and undivided profits of this company might be only the municipal bonds and the income thereof. But it might also be the "moneys" paid in to the corporation to buy bonds with and "moneys" already received and on hand as income from said bonds; and also other forms of property taxable under Laws 1929, Chapter 168, Page 577. It is true the property would most likely be all tax-exempt and not subject to deduction from the capital stock to determine the assessed valuation for intangible taxation. But this would increase rather than diminish the intangible tax of such a corporation. It is therefore, our opinion that the capital stock of the company would have to be taxed at eight mills on the dollar with no deductions.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

BLUE SKY LAW—SALE OF STOCK ABOVE PAR

February 22, 1929.

Mr. J. L. Kizer, Acting Chief,
Bureau of Securities,
State House,
Lincoln, Nebraska.
Dear Sir:

This is in answer to your kind letter of February 20, 1929, requesting a formal opinion of the Attorney General as to whether a corporation with a capital stock of $14,000.00 can issue and sell stock above par to produce a $25,000.00 capital without complying with the Blue Sky Law.

The exemption, if any, of this stock, from the Blue Sky Law is governed by Section 8115, Compiled Statutes of Nebraska, 1922, as amended by Session Laws, 1925, Chapter 32, Section 1, Subdivision (e), Page 137, reading as follows:

> "Securities of any corporation organized under the laws of this state whose authorized capital stock, when **not sold above par**, added to its other outstanding securities, shall not exceed Twenty-five Thousand Dollars; but this exemption shall apply only to securities issued by such company."

No where in the Blue Sky Law, as a whole, do we find any pro-

visions authorizing corporations to sell stock above par without complying with the Blue Sky Law and without approval of the Bureau of Securities. To those familiar with its history, it is well known that the Blue Sky Law was specially designed to prevent the sale of corporate stocks at values above actual values.

The argument that companies with a small capital stock are prevented from creating a working surplus unless their stock is sold above par without supervision of the Bureau, is not persuasive. The supervision and approval of the Bureau in legitimate corporate-stock issues is neither expensive nor hard to get.

We, therefore, adhere to our opinion that in Nebraska corporate stock cannot be sold above par without complying with the Blue Sky Law.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

TRUST COMPANIES—"CHARACTER" LOANS

September 16, 1929.

Mr. Rees Wilkinson,
16th & O Sts.,
Lincoln, Nebr.
Dear Sir:

You ask if there is anything in the laws of Nebraska that would prevent a "Trust Company" from loaning money to small borrowers (sometimes referred to as character loans) on notes with 3 co-signers.

The powers of trust companies are enumerated and defined in Section 8068, Compiled Statutes for 1922 as amended by Chapter 35, Laws of 1927.

Paragraph 6 of Section 8068, authorizes trust companies: "To loan money upon real estate and upon collateral security, when the collateral would of itself be a legal investment for the said corporation."

We do not believe that this provision is broad enough to include the kind of loans suggested by your question and are of the opinion, therefore, that a trust company does not have authority to make such loans.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

CORPORATIONS—EXTENSION OF TERM OF CORPORATE EXISTENCE IN ABSENCE OF PROVISION IN ARTICLES

December 19, 1929.

Mr. Wm. Kershaw,
Sterling, Nebraska.
Dear Sir:

The Secretary of State has referred to this Department for reply your letter of December 17, 1929, requesting opinion as to whether less than all of the stockholders of a corporation may make a valid charter amendment extending the date of the termination of the corporation, when there are no provisions in the charter for amendment.

A corporation's charter consists of all the statutes on corporations and the articles of incorporation (Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279, 62 N. W. 480). Among the contents of the articles should be the date of the company's termination of which notice is required to be published at the time of incorporating (Section 465, Compiled Statutes of Nebraska, 1922). General power to amend the articles in the same manner as originally adopted, recorded and published is conferred by Section 467, Compiled Statutes of Nebraska, 1922. It is also noted that by Section 1 of Article XII, Constitution of Nebraska, the state has not only failed to reserve power to change, amend or extend corporate charters by special law, but has prohibited the extension, amendment or change of such charters by special law.

Under these legal circumstances, the general rule of law with reference to the amendment of corporate charters by less than all of the stockholders, is as follows:

> "Where the state has not reserved the power to alter, amend or repeal the charter of a corporation, the provision of the Constitution of the United States against laws impairing the obligation of contracts protects the contracts between the corporators or members, and between them and the corporation as well as the contract between the state and the corporators or corporation, and therefore **any material or fundamental amendment of the charter by or under legislative authority in order that it may be binding must have the unanimous concurrence of all the stockholders or members.**"

> "Of course, a majority of the stockholders or members, or a particular majority may amend the charter to any extent authorized by law, so as to bind the minority, where such power is expressly given by their original agreement, charter or articles."

14 Corpus Juris, 187, Notes 55 and 56.

14 Corpus Juris, 189, Note 65.

7 Ruling Case Law, 115, Note 6.

The application of these rules is unaffected by the fact that the company you describe may be a de facto corporation. The doctrine of de facto corporations applies, not in favor of the corporation, its officers and members, but in favor of third persons with whom the company has dealt by holding itself out as a corporation (Lusk v. Riggs, 70 Neb. 718; Gilligan v. Gilligan Co., 94 Neb. 437). The rule is that "where a corporation continues to exercise, without authority, its corporate power after the expiration of its charter by lapse of time, it does not thereby become a de facto corporation, insofar as it may assert rights and powers as a corporation" (7 Ruling Case Law, 66, Note 13).

It still remains to be determined whether a charter amendment, extending the date of the company's termination, is a material and fundamental change, which, in the absence of a charter provision therefor cannot be made without the consent of all the stockholders. Upon the precise question of whether such extensions of corporate duration are material and fundamental changes requiring unanimous consent of all the stockholders, we find no decisions of the Nebraska Supreme Court or other courts. But upon principle, we are nevertheless of the opinion that such change is material and fundamental. In other contracts, the time or period fixed for performance is held to be material and fundamental (See Davis v. Ferguson, 111 Neb. 691, 197 N. W. 390). No good reason suggests itself why the time limits in the contract between stockholders for incorporation should not also be looked upon as material and fundamental.

We, therefore, conclude that less than all of the stockholders of a corporation cannot bind the non-consenting stockholders by a purported charter amendment extending the date of the termination of the corporation where there are no provisions in the charter for amendment by a given number less than all the stockholders; and that the corporation stands dissolved and subject to liquidation as of the date fixed for its termination in the original articles (See Section 477, Compiled Statutes of Nebraska, 1922).

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

COUNTIES—COUNTY CLERK—PURPOSE OF ELECTION AND ASSESSOR'S SUPPLIES—PUBLIC LETTING

September 6, 1930.

Mr. H. F. Mattoon,
County Attorney,
Beatrice, Nebraska.
Dear Sir:

This is in answer to your kind letter of September 3, 1930, requesting our opinion on the following questions:

> "1. Does the County Clerk have authority to purchase election supplies and assessor's supplies without the approval of the County Board?
>
> "2. If the County Board asks for bids on election or assessor's supplies, can the County Clerk legally ignore such request and purchase without bids?"

The pertinent statutes appear to be Sections 852, 865, 1013, 1938, 1939 and 5937. Section 1013 provides that contracts for the purchase of more than $200.00 worth of books, blanks and stationery for county offices shall be let by the board to the lowest competent bidder. In this section election and assessor's supplies are not referred to and it has been held that this section does not apply to tax list and proceedings of the board (State v. Lincoln County, 35 Neb. 346).

By Sections 1938 and 1939 the provision of ballots and election supplies is the duty of the county clerk, and the expense thereof is a county charge payable as other county expenses. By Sections 852 and 865 the payment of county expenses is the exclusive original power and duty of the county board (Dixon County v. Barnes, 13 Neb. 294). By these sections the only way money can be gotten out of the county treasury for election and assessor's supplies and other county expenses, is by the verifying, filing and allowance by the county board, or by the district court on appeal, of a claim therefor.

We fail to find any law fixing the amount to be charged or expended for election and assessor's supplies. Hence, the board acts judicially and not ministerially in acting on claims for such expenses, and the allowance thereof cannot be compelled by mandamus (Otoe County v. Stroble, 71 Neb. 415; Chase Co. v. Kelly, 69 Neb. 426).

In this connection it should also be observed that, even if the board's approval is essential to the clerk's purchase of election and assessor's supplies, if the clerk without the board's approval buys these supplies which are used by the county, the county will be liable for the reason-

able value of the benefits thus received (Hustead v. Richardson County, 104 Neb. 27). Hence the total disallowance of such a claim would probably be rectified by the district court on appeal.

In the light of the foregoing rules and principles, we come to the following conclusions on your questions: first, that the county clerk has authority to purchase election supplies and assessor's supplies without the approval of the county board; second, the clerk can legally ignore the board's request for bids on such supplies, and purchase without bids; third, that the clerk, without the board's approval, does not bind the county by his contracts for purchase of such supplies, for any more than the supplies are reasonably worth. With the clerk empowered to buy and the board empowered to pay for the supplies, the necessary cooperation between the clerk and the board in getting the supplies for the right price is ultimately assured.

With kind personal regards, we are

Sincerely yours,
C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

COUNTIES—OVER 100,000 POPULATION—BUILDING OF JAIL

September 10, 1930.

Hon. Max G. Towle,
County Attorney,
Court House,
Lincoln, Nebraska.
Dear Sir:

This is in answer to your kind letter of September 9, 1930, requesting opinion upon the following question:

> "Whether or not a county of one hundred thousand or more can build a jail or other county buildings with money on hand in the general fund, either by using the money directly or by transferring it, rather than making the statutory levy for the erection of the building. Would it make any difference if an emergency existed?"

The only emergency provision for jails appears to be Section 1056 which applies to counties of one hundred and fifty thousand or more inhabitants.

Section 1023 appears to authorize transfers from the county general fund in the discretion of the county board where the general fund is not thereby reduced below two thousand dollars.

However, after such transfer is made, if made, there is still a statutory limitation on the board's power of appropriation for county buildings including jails. Section 854 provides in part:

> "But no appropriation exceeding fifteen hundred dollars shall be made for the erection of any county building **except as hereinafter provided** without first submitting the proposition to a vote of the people of the county at a general election or a special election ordered by said board for that purpose, and the same is ordered by a majority of the legal voters thereon."

Then follow the exceptions referred to in the underscored phrase of the above quotation. These exceptions provide for the "statutory levy" which is expressly excluded from your question.

The above quoted language of Section 854 fell to be construed in State v. Lincoln County, 18 Neb. 283, 286, wherein the court said:

> "While it is true that by Section twenty five it is made the duty of the commissioners to provide a jail, yet this **duty** is made to depend upon the fact that the finances of the county will justify it. It is contemplated that if the money is in the treasury it may be appropriated for that purpose. **But no appropriation** exceeding fifteen hundred dollars shall be made without being authorized by a vote of the people."

This limitation was apparently still impressive with the court in State ex rel Polk County v. Marsh, 106 Neb. 760, 763 wherein it is set out and quoted as a part of the special jail-construction provisions held to be controlling.

We, therefore, reluctantly conclude that, without previous authorization at a general or special election of a majority of the legal voters of the county, the county board of no county, except counties of 150,000 or more people in the emergency provided by Section 1056, is empowered directly or indirectly to appropriate for jail or other county-building constuction purposes more than fifteen hundred dollars of available general funds.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

CRIMINAL LAW—PRISONERS—"FARMING OUT" WITH PRIVATE PERSONS

October 15, 1930.

Hon. J. A. McGraw,
County Attorney,
Tryon, Nebraska.
Dear Sir:

This is in answer to your kind letter of October 13, 1930, in which you state and inquire:

> "Please give me your construction of section 10209 statutes 1922 as to the power of county board to place one sentenced to hard labor in the county jail of the county, with a private person living in the county and satisfactory to the board, and who will pay a sum satisfactory to the board, for such services to be rendered by such person sentenced.
>
> "I have advised the board that they have the right to do so, but Judge I. J. Nisley believes that the board only has the right under said section to place one so sentenced, any place in the county to work upon some public service either for the county or the state, and I would like to have your construction of the section."

The pertinent laws appear to be Sections 10209 and 10210, Compiled Statutes, 1922, reading as follows:

> "For the purpose of enabling the county board of any county in this state to employ in a profitable manner all persons who have heretofore been or may hereafter be sentencd to hard labor in the jail of the county, said board, or a majority of them, shall have power to designate the place where the persons so sentenced shall work, and to make all proper and needful regulations and provisions for the profitable employment of such convicts, and for their safe custody during such employment. The county jail is hereby declared to extend to any stone quarry, road or other place that shall be designated by the county board for the employment of such convicts."
>
> Sec. 10209.
>
> "It shall be the duty of the county board to make the contracts for the employment of convicts as specified in the preceding section, and the sheriff of the county shall collect the proceeds of all such labor, and after paying the board of such convicts and the expenses incident to such labor, to pay the balance to the county treasurer within ten days."

Section 10210, Compiled Statutes.

So far as we know no county has attempted to take advantage of this statute and there are no other decisions on it in this state. Obviously, any system of farming-out prisoners to private persons for labor has in it great possibility of abuse. The experience of a number of southern states with this system does not make very pleasant reading.

Section 10210 specifically provides that the county board may "make contracts for the employment of convicts" and does not confine the scope of such contracts to public work. We therefore are of the opinion that your construction of the statute is correct.

Very truly yours,

C. A. SORENSEN, Attorney General.

COUNTY ASSESSOR—ELECTION OF

October 5, 1929.

Mr. T. G. Wedell,
County Clerk,
Keya Paha County,
Springview, Nebraska.
Dear Sir:

In answer to your inquiry under date of September 18, 1929, relative to the necessity of the election of a County Assessor in the year 1930, under the provisions of House Roll No. 223, Laws of Nebraska, 1927, Page 283, amending Section 1909, Compiled Statutes of Nebraska for 1922, it is our opinion that the law as thus amended has not made it necessary to elect a County Assessor, if the county, either prior to the amendment of 1927 or since that time has, by the election provided for in the act, abolished the office of County Assessor. There is nothing in the act as amended to indicate that the legislature intended to revive the office of County Assessor in any county where such office had been theretofore abolished under the old Section 1909, Compiled Statutes of Nebraska for 1922.

It is well established that "the simultaneous repeal and re-enactment of a law has the effect of continuing the uninterrupted operation of the statute" (Schneider v. Davis, 109 Neb. 638, 192 N. W. 230. Gooch Milling & Elevator Co. v. C. B. & Q Railroad. Co., 109 Neb. 693, 192 N. W. 231).

Of course if your county has not abolished the office of County

Assessor, it is clear that such office must be filled as required in the statute as amended.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

COUNTIES—AUDIT OF COUNTY RECORD

April 25, 1930.

Mr. Ed Wallen,
Palmyra, Nebr.
Dear Sir:

Some time ago you asked for a statement of the law regarding auditing of county books and records by the county board.

The county board is authorized by Section 2402, Compiled Statutes for 1922 to audit and allow the fees fixed by law for services performed by justices of the peace, constables and sheriffs in the arrest and examination of offenders charged with felony.

Section 1016, Compiled Statutes for 1922 provides that the accounts for books, blanks and stationery furnished under contract to county officers, as provided in Section 1015, Compiled Statutes for 1922, shall be audited and paid as other accounts against the county.

Section 6215, Compiled Statutes for 1922 provides:

> "It shall be the duty of the county board to examine the books and dockets of the several officers herein named, and if they find that they have failed to report or pay over any of the money or fees intended to be paid over or reported by any of the provisions of this article, it shall be the duty of the county board to notify such officers to pay over such moneys or fees at once, and if the officer shall fail to pay over such fees or moneys to the county treasurer, as hereinbefore provided, it shall be the duty of the county board and they are hereby authorized to commence suit in any court having jurisdiction against the officer and his bondsmen, offending against the provisions of this article; such action shall be commenced in the name of the chairman of the county board for the benefit of the common schools of their respective county."

The officers apparently referred to in Section 6215, supra, are the clerk of the district court, county judge, and justices of the peace, which are mentioned in Section 6214, immediately preceding the section above quoted.

We do not believe there is any law requiring the county board to make a general audit of the books of the several county officials other than those above noted.

Yours very truly,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

COUNTIES—AID TO FARM BUREAU

June 13, 1930.

Mr. J. T. Costin,
Willow Island, Nebr.
Dear Sir:

We have your letter of the 10th in which you state that certain members of the farm bureau and other persons who wish to send agricultural exhibits to the state fair have asked the county board to give them financial aid for such purposes. You ask if the county board may legally give such aid.

Chapter 55, Laws 1927, authorizes the county boards of the several counties, "whenever petitioned by the number of persons hereinafter designated who are bona fide residents of the county, and who are actually and actively engaged in farming therein, and who shall petition the county board to appropriate a sum of money out of the general fund of the county, for the purpose of promoting improvement in agricultural methods, increasing agricultural products, the more economical distribution of such products, the conservation of the soil and for the purpose of employing and maintaining a county agricultural agent in said county, or counties under the administration of the farm bureau to aid therein, shall set aside annually, from the county general fund, such sum of money for use in accordance with the provisions of this act."

The act goes on to provide the number of signers required for such petitions, depending upon the population of the county, and requires that such petitions shall be filed with the county clerk not later than the first of September of each even numbered year. Any bona fide resident of the county actively engaged in farming may sign a remonstrance against the allowance of such fund, and if such remonstrance is filed on or before September 20 of the same year that the petition is filed and shall contain one-eighth more signers than are on the original petition, the question shall then be submitted to a vote of the people at the next general election. Otherwise the county board must grant the aid to the farm bureau upon the filing of the petition provided for in the statute.

We think it would not be objectionable if the farm bureau, hav-

ing secured an appropriation from the county as provided in Chapter 55, Laws 1927, should use a part of the money so provided for the purpose of preparing and sending exhibits to the state fair, but we believe that the county board has no authority to grant money for that purpose to any private individual or association nor even to the farm bureau for that specific purpose.

It is our opinion that your county attorney has correctly advised the board as to the law on this subject.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

ELECTIONS—COUNTY COMMISSIONERS—NOMINATION

September 30, 1930.

Mr. Fay H. Pollock,
Attorney at Law,
Stanton, Nebraska.
Dear Sir:

You say:

"A petition is being circulated in Stanton County under the provisions of Chapter 98, Session Laws 1927, Page 277, for the purpose of nominating a candidate for the office of County Commissioner in one of the several districts of Stanton County, Nebraska. The questions presented are:

"1. The Commissioner's District being one of the subdivisions of the County, and candidates for that office being nominated by the District from which they come, and being elected by the County at large in the general election, would the petition for nomination be signed by residents of the County at large, or by the particular Commissioner's District?

"2. If from the particular Commissioner's District, what number of signatures would you hold would be required?

"3. If you hold that the petitioners must be from the particular Commissioner's District, and also that a one-fourth rule as provided for in the above mentioned Session Law applies, please inform as to what primary or general election the legislature intended should be their guide for the one-fourth mentioned in the 1927 Session Laws."

I will endeavor to answer the above questions in the order in which they are asked.

1. I am of the opinion the nominating petition should be signed by residents of the district in which the candidate resides and for which he is to be nominated (See Section 879, Compiled Statutes of Nebraska, 1922).

2. I am of the opinion although the matter is not entirely free from doubt that in as much as the nomination is to be made by the electors of the subdivision less than a county the required number of electors will be that required to nominate a candidate to be elected by the electors of a subdivision less than a county. Fifty is sufficient in any such case (See Chapter 98 Session Laws of 1927). If, however the petition is signed by two hundred electors all chance for cavil will be eliminated.

3. The statute does not state how the number of electors in the district or county shall be determined, and I take it that is not material in this case, for one-fourth of the electors in any commissioner district in your county will be more than fifty.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

ELECTIONS—PRIMARY—NOMINATION BY TWO PARTIES

October 1, 1930.

Mr. Paul Kingsley,
Commissioner First District,
Stanton, Nebraska.
Dear Mr. Kingsley:

Your letter of September 28th at hand in which you say that you received the democratic nomination for county commissioner and also fifteen per cent of the republican vote cast for county commissioner.

If you received more votes on the republican ticket than any other candidate on that ticket and if you accepted the republican nomination, then your name will appear on the ballot followed by the words, "Democrat and Republican."

If you had lost the democratic nomination you would not under the laws of the state have been allowed to accept the republican nomination.

Also there is some doubt about the law because it is not clear. This office has held that the signers of a petition for candidate for county commissioner should in our opinion be residents of the commissioner's district in which the candidate for commissioner resides.

Sincerely yours,

C. A. SORENSEN, Attorney General.

COUNTY BOARD—PUBLIC SESSIONS

March 19, 1930.

Mr. Frank J. Hammont,
Broken Bow, Nebraska.
Dear Mr. Hammont:

This is in answer to your kind letter of March 17, 1930. It appears that the County Board's Bridge Committee has excluded from its sessions on bids for bridge materials residents and taxpayers of the county. You inquire as to the legality of this proceedure.

I fail to find any law forbidding the use of this rule of exclusion. It is nevertheless clear to me that this is a practice which might well be discontinued by the Board and its committees with improved public confidence in the prudence and integrity of their fiscal transactions. As the head of a state, money-spending agency, I have always taken the position that the public and taxpayers are entitled to know all they desire about the business and expenses of this Department. On these subjects, I receive observers and give information every day both personally and by letter. To me, public office is a public trust of which the officer is the trustee and the people, the beneficiaries. The trustee works in a glass cage, so to speak, with all the beneficiaries enjoying a full, free view of his doings. The fullest publicity on governmental affairs is, in my opinion, indispensable to the continuous growth of the people in self-governing capacity, without which democratic institutions can neither succeed nor endure.

I am not surprised that my professional colleagues, who are among leaders of the Bar in your county, take the same view of this question that you and I take. Lawyers are trained from youth in the fundamental principles of American legal and political institutions. They know almost by instinct that courts, councils, legislatures and boards are inherently public bodies.

Although the courts have not officially decided this question, there is much in their decisions and opinions which should encourage the Board to let the taxpayers in on its meetings and committee meetings. In Morton v. Carlin, 51 Neb. 202, our Supreme Court held that the powers of the board are to be strictly construed. It is also held that the county board cannot transact business except at a regular or special meeting held at the county seat (Morris v. Merrell, 44 Neb. 423; Merrick County v. Batty, 10 Neb. 176). These rulings show an intent of the legislature and the courts to facilitate public information regarding the county's business.

Confidently expecting that the Board may soon change its attitude

in this matter, and with kind personal regards, I am

Sincerely yours,

C. A. SORENSEN, Attorney General.

CENSUS—CHANGE OF POPULATION—EFFECT ON SALARIES OF OFFICERS—COUNTY JUDGE

April 25, 1930.

Mr. Ed Wallen,
Palmyra, Nebr.
Dear Sir:

Some days ago you requested an opinion from this department as to whether a county judge who is now receiving a salary of $2200.00 per year on the basis of the 1920 census which determined the population of the county to be between 16,000 and 20,000, would be entitled to an increased salary during his term of office should the 1930 census show the population of the county to be more than 20,000, and also whether he would lawfully be entitled to additional salary or compensation for past services as county judge by reason of such increase of population.

Section 2394, Compiled Statutes of Nebraska for 1922, as amended by Chapter 108, Laws of 1929, fixes the salary of county judges in counties having more than 16,000 population and less than 20,000 population at $2200.00 per year. In counties having 20,000 and less than 25,000 population the salary is $2500.00 per year.

Article V, Section 15 of the Constitution of Nebraska provides for the election of a county judge in each county for a term of four years, whose salary shall be fixed by law.

Article III, Section 19, of the Constitution provides:

> "The Legislature shall never grant any extra compensation to any public officer, agent, or servant after the services have been rendered nor to any contractor after the contract has been entered into nor shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature subsequent to the adoption hereof be increased or diminished during his term of office."

In State v. Moore, 61 Neb. 9, 84 N. W. 299, our supreme court held that the section of the constitution above quoted applied to all offices created by the constitution of the state. It would therefore apply to the office of county judge which is created by the constitution.

We are of the opinion that the county judge would not be entitled to

recover additional salary or compensation for services already performed and for which he has been paid.

If, however, the 1930 census should show the fact to be that the county now has a population of more than 20,000, or if this fact should be proved by other competent and satisfactory evidence, we think the county judge could legally be paid the salary of $2500.00 per year as provided in Section 2394, Compiled Statutes for 1922, as amended, for the remainder of his term of office. We think this would not be a violation of the constitutional provision above quoted forbidding increase in salary during the term of office, because the salary has already been fixed by the legislature to take effect whenever the population goes above 20,000 and that fact has been satisfactorily established. This would not, however, in our opinion authorize the board to pay additional salary or compensation for services already performed by the county judge and paid, even though it should be found that the population had passed the 20,000 mark some years ago.

Yours very truly,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

SHERIFF—MILEAGE—CLAIMS FOR

August 9, 1930.

Mr. Fred T. Hanson,
County Attorney,
McCook, Nebraska.
Dear Mr. Hanson:

We are pleased to answer the questions contained in your kind letter of August 6, 1930, as follows:

1. Q. "Is the sheriff entitled to mileage or only to actual expense for taking prisoners to the penitentiary under section 7001 or does the actual expense provision apply only to the assistant if one is taken?"

A. In our opinion Section 7001 limits both the sheriff and his assistants to actual and necessary expenses in going and coming. The use of the semi-colon, instead of the colon in separating the actual-expense clause from the language pertaining to assistants, seems indicative of the legislative intent.

2. Q. "If the sheriff is entitled to actual expense only in that case does the same apply to the reformatory for men under section 7027 referring to the 'law governing state prisons'?"

A. Yes; that is the self-evident purpose of Section 7027.

3. Q. "In conveying prisoners to the Industrial Schools at Kearney and Geneva and the reformatory at York is the sheriff entitled to mileage under section 2381?"

A. Sections 7036, proviso, 7044 and 7050, last sentence are special statutory provisions for the expense of sheriffs in conveying persons to the Kearney, Geneva and York institutions. These, in our opinion, exclude mileage and mean actual and necessary expenses although the question is open, undecided and not free from doubt.

4. Q. "Is he entitled to mileage for returning a prisoner from another state for trial?"

A. "No. Section 10015, pertinent to the return of extradited fugitives, provides for the auditing of accounts of any extradition agents, who may or may not be sheriffs, and, in our opinion, excludes mileage.

5. Q. "If the sheriff should be allowed only actual expense and not mileage, can the county recover back the difference after the claim has been allowed and the warrant delivered and paid, or set the same off against other claims."

A. No. The county board in allowing the claim acted judicially, and not being appealed from, the adjudication that the county owed the claim became final (Heald v. Polk County, 46 Neb. 28).

6. Q. "Under section 868 permitting the re-consideration of claims, is the board limited to the ten days during which the warrants are to be held on the claims allowed or to the period since the last election of a member under Stenburg v. State, 48 Neb. 299, or just what is the limit of time for this?"

A. We find no time limits fixed by law, other than the one made in Stenburg v. State, 48 Neb. 299, within which the re-consideration of claims must be had.

With kind personal regards, we are

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

SHERIFF—RENT—FEES AS JAILER

August 22, 1930.

Mr. Ezra W. Cuplin,
Sheriff of Brown County,
Ainsworth, Nebraska.
Dear Sir:

You inquire if the county board has a right to charge a sheriff rent on a sheriff's residence belonging to the county. You say that the Brown County jail is in connection with the sheriff's residence and the sheriff is absolutely required to occupy it. Some adult member of the family must be on duty all the time as guard.

The county board is required to provide suitable office rooms for the sheriff, Sec. 854, Comp. St. 1922, but we find no statute requiring it to furnish the sheriff a residence for his family. If it does furnish such residence we think it has the right to require him to pay rent, even though it may be necessary for his family to live in such residence in order that he may perform his duties as sheriff. A person accepting a public office takes it with its burdens, and whenever those become insufferably oppressive he may always resign. State v. Meserve, 58 Neb. 451.

In the case of Iler v. Merrick County, 96 Neb. 114, 147 N. W. 118, our Supreme Court held that where a sheriff is required to occupy the rooms in the second story of the county jail under a resolution of the county board requiring him to pay the sum of $50.00 a year for fuel and lights, which he has paid according to the terms of the resolution, he is not liable to the county for rent for the use of the county jail. In that case Merrick County was trying to recover from the sheriff for the "reasonable rent" of the jail on an implied contract, and the court held that the resolution passed by the board and its acceptance constituted the contract between the parties, and the sheriff having performed his part by paying the $50.00 was not liable for further rent.

Of course, if the county board has never by resolution or otherwise formally required the sheriff to pay rent for use of the jail as a residence, and his official duties require him and his family to live there, we think there is a question whether the county could hold him liable for rent on an implied contract.

We are not undertaking to say that in your particular case you are or are not liable to Brown County for rent, because it would depend entirely on the circumstances of the case, but we think a county does have the right as a general thing to charge rent for the use of the jail as a residence.

You also state that you receive $1.50 per day for jailer's fees, and ask if the law allows you a larger sum for guard fees.

Section 2381, Comp. St. Neb. 1922, provides that the sheriff shall be allowed $1.50 per day as jailer "where there are prisoners confined in the county jail." He is allowed $2.00 per day for guarding prisoners "when it is actually necessary." See also, Gage County v. Kyd, 38 Neb. 164, 56 N. W. 964.

Where the sheriff acts as jailer he is entitled to his fee of $1.50 per day as jailer in addition to his compensation as sheriff. Dunkel v. Hall County, 89 Neb. 585, 131 N. W. 973. Iler v. Merrick County, 96 Neb. 114, 147 N. W. 118

You ask what other counties in Nebraska charge rent on sheriffs' residences. We regret that we have no information on this matter. You doubtless could get the information by writing to the sheriffs of the several counties.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

SHERIFF—BOARDING PRISONERS—MILEAGE

October 3, 1930.

Mr. S. J. Woodruff,
R. F. D. No. 6,
Florence, Nebraska.
Dear Sir:

We are pleased to answer the questions contained in your kind letter of September 27, 1930, as follows:

1. Q. "What does the law allow a sheriff per day for the board of prisoners in the county jail?"

A. In Endres v. McDonald, 215 N. W. 114, the Nebraska Supreme Court held that Section 3006, Compiled Statutes, 1922, governed the rate of pay received by the sheriff for boarding state prisoners. This rate is seventy cents per prisoner per day. Laws 1925, Ch. 86, Page 263 attempted to amend Section 3006 and to provide a special method of paying for the boarding of state and other prisoners in Douglas County. This amendment was held unconstitutional in Endres v. McDonald, supra, wherein it was also held that Section 2381, Compiled

Statutes, 1922, governed the sheriff's pay for boarding prisoners other than state prisoners. The pertinent provision of Section 2381 reads as follows:

> "For boarding prisoners, seventy-five cents per day in all counties where there is an average of less than one hundred prisoners per day, and fifty cents per day where there is an average of more than one hundred prisoners per day."

The rate is thus seventy cents per day per prisoner for boarding state prisoners; seventy-five cents per day per prisoner for boarding prisoners other than state prisoners if there is an average of less than one hundred prisoners per day and fifty cents per prisoner per day for boarding prisoners other than state prisoners if there is an average of more than one hundred prisoners per day.

2. Q. "Does the law allow a sheriff mileage for taking prisoners to the state penitentiary and for conducting inmates to the other state institutions; or is it only $3.00 per day?"

A. For such services the sheriff gets $3.00 per day for time actually necessary in conveying the prisoner to the institution and return; also his actual and necessary traveling expenses in going and coming as examined, adjusted and approved by the county board. For such service the sheriff receives no mileage. (See Sections 7001, 7027, 6097, 7036, 7044 and 7050, Compiled Statutes, 1922).

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

ELECTIONS

January 17, 1930.

Mr. M. M. Runyan,
County Attorney,
Broken Bow, Nebraska.
Dear Mr. Runyan:

Your letter of January 11th at hand in which you ask if it is permissible for a candidate for office to have the prefix "Dr." before his name on the ballot.

It is the opinion of this office that such designations should not be permitted on the ballot. If one candidate is entitled to have the

prefix "Dr.", then another candidate would be entitled to have the prefix "Hon.", or the prefix "Esq." after the name, and so on. The statute says that the name shall be placed on the ballot and a prefix is not a part of a name.

Sincerely yours,

C. A. SORENSEN, Attorney General.

ELECTIONS—CITY AND SCHOOL DISTRICT—CAUCUS

March 24, 1930.

Mr. Frank M. Johnson, Attorney.
Lexington, Nebraska.
Dear Sir:

You say that our statute does not seem to cover the procedure to be followed in the matter of selecting candidates for city offices and members of the school board, by means of a caucus, and you ask for an opinion from this office upon the question.

Allow me to say that this office is still of the opinion that the clerk will be justified in having printed upon the official ballot the names of such candidates as are certified to him to have been nominated at a convention or caucus in conformity with the provisions of Section 2123. provided they are nominated at a convention or caucus of a party that has heretofore been in existence in the city.

If they are nominated at a convention or caucus of a new political party, it may be well in order to avoid all cavil to comply with the provisions of Chapter 101, Session Laws of 1929.

Yours very truly.

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES. Assistant Attorney General.

ELECTIONS—CONDUCT OF

March 28, 1930.

Mr. Al. N. Dafoe,
Tecumseh, Nebraska.
Dear Sir:

You say:

"What I would like to know is whether friends of the candidates are prohibited by law from hauling to the polls voters. There are no political committees, but the hauling is done by people interested in having the one they are for elected.

"Also can the clerks and judges of election prohibit watchers and challengers for the various candidates from being in the poling place and offering challenges to the vote of any person.

"Also there is a bond issue up and can persons favoring either side be permitted to be in the room and challenge, and can they be prohibited.

"Also can any voter have access to the poll books to see who has voted and who has not, and can the clerks and judges refuse such permission."

I will endeavor to answer your questions in the order in which they are asked.

1. I do not believe friends of the candidates if they are not members of a political committee are prohibited from hauling voters to the polls. Section 2320, Compiled Statutes is a penal statute and its provisions are strictly construed.

2. Section 1989, Compiled Statutes, provides that:

"Any person offering to vote may be challenged as unqualified by any judge or elector."

3. I know of no reason why the above answer should not apply in the case of those offering to vote at a bond election.

4. I do not recall any statutory provision which either authorizes or denies any voter access to the poll books in order to ascertain what voters have and what voters have not voted. In the absence of any such provision I am inclined to the opinion that the election officials may do as they please about granting such permission.

Very truly yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

ELECTIONS—SCHOOL DISTRICT—QUALIFICATIONS OF ELECTORS —CONSTITUTIONAL LAW

May 8, 1930.

Mr. A. N. Dafoe,
Attorney-at-Law,
Tecumseh, Nebraska.
Dear Sir:

I am of the opinion that one who has been a resident of a school district for at least forty days and possesses the other requisite qualifications set out in Section 6271, Compiled Statutes is an elector at a school district election even though he may not have been a resident of the state six months so as to be entitled to vote at a general election.

In the case of State v. Cones, 15 Neb. 444, the Supreme Court of Nebraska held that women possessing the qualifications prescribed by statute might vote at a school district election. At that time women were not permitted to vote at general elections but Judge Maxwell who wrote the opinion in that case said:

> "An examination of the constitution will convince any one that the provisions in regard to elections were not intended to apply to school districts."
>
> 15 Neb. 444.

Similarly in the recent case of Cunningham v. Ilg, reported in 226 N. W. at page 333 thereof Section 6271, Compiled Statutes is cited and it is held that "an unmarried woman of legal age and a citizen though residing in the school district, but having no children and no property, is not entitled to vote at the annual meeting of a rural school district." The Supreme Court was evidently of the opinion that the provisions of the constitution relative to the qualifications of a voter at a general election, were not applicable to voters at a school district election.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

ELECTIONS, PRIMARY—OFFICERS NOMINATED—CAUCUS

June 13, 1930.

Mr. S. B. Morehead,
Albion, Nebraska.
Dear Sir:

This is in answer to your kind letter of June 3, 1930, requesting information as to "when we should hold our precinct caucus throughout our county to nominate Road Overseers, Justice of the Peace, Precinct Assessors, men and women Precinct Committeemen"; "where to find provisions for holding such caucuses"; and "what offices must said caucuses nominate."

In this connection permit us to say that there is no longer any provision of law for the selection of men and women precinct committeemen. The former law upon this subject was Section 2165, Compiled Statutes of Nebraska, 1922, requiring the election of such precinct committeemen at the primary election every two years. This law was repealed by Laws 1923, Chapter 78, Section 3, Page 217, and no other and different provisions were made by law for the selection of precinct committeemen. We are, therefore, of the opinion that precinct committeemen may be selected in any manner that the political parties of the county may determine, and that neither yourself nor any other public officer has any duties to perform in connection with the selection of such committeemen.

The justice of the peace is a precinct officer (Laws 1923, Chapter 152, Sec. 2, Page 370). The precinct assessor is also a precinct officer (Secs. 5883 and 5835, Compiled Statutes of Nebraska, 1922). The road overseer is not, strictly speaking, a precinct officer but a road district officers. But, since each precinct must contain one entire road district the road overseer or overseers of the road district or districts of the precinct, are, in the broad and non-technical sense, precinct officers (Sec. 2690, ibid.). It is, therefore, in our opinion, proper to consider road overseers, justices of the peace and precinct assessors, as precinct officers.

Such precinct officers, it is clear, are not nominated at the primary election. Section 2096, Compiled Statutes of Nebraska, 1922, expressly excepts precinct officers from nomination at the primary election. Section 2096 is original Section 2138, Revised Statutes of Nebraska, 1913 as amended by Laws 1915, Chapter 33, Page 101. This law was amended by Laws 1919, Chapter 90, Section 1, Page 223, which added to the present language of Section 2096 the following: "nor shall this article (Primary Election Law) apply to the nomination of a candidate for any state office other than that of members of the

legislature, governor, United States senator and members of Congress." With this amendment added, present Section 2096 was referred to the electors of the state and the above quoted amendment was rejected by said electors at the general state election held November 2, 1920 (See original records, Secretary of State's office). The rejectment of the amendment, in our judgment, left in force Section 2096 as it now stands. By this section, precinct officers are not to be nominated at the primary election.

The doubt and confusion existing in some legal minds as to whether precinct officers are to be nominated at the primary election is apparently due to the presence in the Compiled Statutes of Nebraska, for 1922 of Section 2095. This section is identical with authentic Section 2096 so far as the non-application of the primary law to precinct officers is concerned, and hence, no practical harm is discernible from the citation of said Section 2095 as authority for the proposition that precinct officers are not to be nominated at the primary election. The historical fact, however, is that Section 2095 was in its entirety rejected by the voters of this state when referred to them at the general state election held Novmber 7, 1922, and is no longer the law. Its presence in the Compiled Statutes must therefore, be due to some inadvertence in compilation.

It is thus established, beyond all peradventure of a doubt, that precinct officers, including road overseers, justices of the peace and precinct assessors, are not to be nominated at the primary election. For the nomination of such officers, the provisions made by law are Sections 2123 and 2124 of the Compiled Statutes of Nebraska for 1922. These sections provide among other things that "all nominations of candidates of any political party for * * * any office to be filled by the electors, **excepted from the provisions of this article**, shall be nominated by a convention or committee of their own political party." As you will observe by a reading at large of said sections, they prescribe only the form, contents and place of filing of the convention or committee's statement or certificate of nomination. The time, place and procedure of the convention or committee, in making the nominations entrusted to them, are left untouched by law and thus apparently remain for determination by the party conventions or party committees concerned. You will notice, however, the command of said sections that the statements or certificates of nomination for precinct officers be filed with the county clerk not less than twenty days before the day fixed by law for the election of the persons in nomination; which we take to mean not less than twenty days before the first Tuesday after the first Monday in November, 1930 and every two years thereafter (See Section 1892, Compiled Statutes, 1922). We, therefore,

conclude that the precinct conventions or committee meetings will be timely held, and their nominations for said precinct officers timely made, if respectively held and made prior to twenty days from the date of the general election.

You are thus advised as to where to find the provisions for holding conventions or committee meetings to nominate candidates for precinct offices not nominated at the primary election; and as to the times of holding such conventions or committee meetings and of making their nominations. We assume that you use the word "caucuses" as an equivalent of the words "convention" and "committee". The word "caucus" is not, however, a technical legal term of art in connection with the nomination of candidates for public office. There are no provisions of law for holding nominating caucuses. The provisions are for a nominating convention or committee.

These party, precinct conventions or committee meetings should, of course, nominate candidates for all precinct offices authorized by law. We fail to find that, in counties not under township organization, there are any such except the road overseers, justices of the peace and precinct assessors (see all laws already cited).

If you desire any further information along these lines, we will be pleased to give it on request.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

ELECTIONS, PRIMARY—PARTY AFFILIATION

August 2, 1930.

Mr. M. E. Burke,
City Clerk,
Kearney, Nebraska.
Dear Sir:

This is in answer to your kind letter of July 25, 1930, in which you inquire:

> "I wish you would advise me if a person registered as a Democrat or a Republican up to the day of election can switch his party affiliation on the day of election and call for an opposite ballot; and if so will it be necessary for him to take the oath provided for in Section 2146?"

The pertinent law is Section 2140, reading in part as follows:

> "In case any party applying does not desire to state his party affiliation, he shall not be required to do so nor shall his failure to do so act as a bar to his registration for the purpose of voting at any election other than a primary election, but shall debar him from voting at any primary election."

We fail to find that the above language of the law has ever been expressly repealed or modified. It has been suggested to us that the above language is inconsistent to some extent with Sections 2144 to 2146. However, we decline to so construe them for the reason that repeals by implication are not favored by the court.

It is our opinion that a registered voter, when he enters the polls and asks for his ballot at a primary election, must accept a ballot of the party of which he declared himself at the time of registration, to be a member. Of course, up to the time that registration closes, he can go to the city hall and modify his registration by changing his party affiliation.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

ELECTIONS—COUNTING BOARD—ADMISSION OF PUBLIC

August 15, 1930.

Mr. Charles Johnson,
Chadron, Nebraska.
Dear Sir:

Speaking with reference to the county board in the first ward of Chadron you say:

"Mr. B....., member of the counting board, ruled otherwise, not permitting any one to enter the room where the ballots were being counted, altho advised by the County Clerk that the count should be opened to the public, and I also called the County Attorney over the telephone, who admitted the public were entitled to admittance to the room where the count was in progress, but stated he could do nothing since the Counting Board refused admittance."

Allow me to say in answer that I do not find any provision of statute which requires that the count by the counting board shall be open to the public neither do I find any statutory provision that it shall not be open under the circumstances above stated.

It may be inferred that it should be open after the polls are closed from the fact the law says the canvass shall be public except in such precincts as are required to have a canvassing board but in the absence of an express statutory provision to that effect I do not care to say the canvassing board was not within its rights if it refused to admit the public to the canvass.

It is probable I think that the canvass could be completed more quickly if it was not public. In any event I do not recall any statutory provision for punishing Mr. B. because he refused to admit the public to the canvass.

Yours truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

ELECTIONS—QUALIFICATION OF CANDIDATES, DETERMINATION OF

October 9, 1930.

Mr. A. Fouts,
County Clerk,
Central City, Nebr.
Dear Sir:

You say:

> "One of our candidates for county superintendent is not legally qualified for the office. If the candidate is not qualified, do I have the right to place the name on the ballot for the general election?"

In answer to the question you ask I will say that Section 2168, Compiled Statutes provides among other things that the county clerk shall place on the ballot the names of the persons nominated for non-political county offices and that,

> "Said names shall be the names of the persons who received the highest number of votes for the office for which they were candidates in the primary."

The law does not require you to pass upon the qualifications to hold the office of persons named as candidates at the primary.

That is a matter to be determined by the court in a proper proceeding if the question is brought to it for decision.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

HOMESTEAD—EXTENT

July 31, 1930.

Mrs. Lulu Kortz Hudson,
Simeon,
Cherry County,
Nebraska,
Dear Mrs. Hudson:

This is in answer to your request for my opinion upon the following state of facts and question arising therefrom:

> "A man dies owning 5000 acres of land. He leaves no will, no debts and no children. At the time of his death, he and his wife were occupying said land as their family homestead. Question is raised as to whether the widow can hold the whole 5000 acres or only 160 acres of this land as her homestead during her life."

Section 2816, Compiled Statutes of Nebraska, 1922, (Sec. 3076, Revised Statutes, 1913) defines the county or rural homestead as "not exceeding two thousand dollars in value, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof," etc.

Section 1220, Compiled Statutes, 1922, provides that, upon the death of a land owner his land descends to his heirs, subject, among other things, to "the rights of homestead."

Pursuant to these provisions of the law, our Supreme Court has uniformly held that the homestead land descends to the widow for life, remainder in fee to his heirs; the word "heirs" including the widow, who, when there are not children, receives one-half of the fee as well as the life estate. Section 1220, Compiled Statutes, 1922,

Fourth subdivision; Whitford v. Kinsel, 92 Neb. 373, 138 N. W. 597; Meisner v. Hill, 92 Neb. 435, 138 N. W. 583; Anderson v. Schurtz, 94 Neb. 390, 143 N. W. 238.

In Meisner v Hill, 92 Neb 435, 138 N. W. 583, it was also held that where the deceased left no debts, the widow's homestead right is not limited to $2000.00 worth of the homestead land but extends to the whole homestead land regardless of its value.

But, as to the extent or amount of land which can be claimed by any owner as a homestead, our Supreme Court in Clare v. Fricke, 102 Neb. 486, 167 N. W. 727, held:

> "The homestead provided for by Section 3076, Revised Statutes, 1913 (Section 2816, Compiled Statutes, 1922) is limited to 160 acres of land."

See also Davis v. Merson, 103 Neb. 397, 399, 172 N. W. 50.

It is, therefore, my opinion that, under the facts stated, the homestead or life estate, which the widow can claim, does not extend to the whole 5000 acres but is limited to 160 acres upon which the family dwelling and appurtenances stand.

With kind personal regards, I am

Sincerely yours,

C. A. SORENSEN, Attorney General.

INHERITANCE TAX—"LINEAL DESCENDANTS"

July 21, 1930.

Hon. Harvey W. Hess,
County Judge,
Hebron, Nebraska.
Dear Sir:

In reply to your letter of July 14th asking our opinion as to the status of children "of a person to whom the deceased for not less than ten years prior to death stood in the acknowledged relationship of a parent" within the meaning of the inheritance tax law and especially Chapter 187, Laws of 1923, we are of the opinion that such children are not "lineal descendants" within the meaning of that law and that they should be classified among those described as "all other cases" in the above mentioned chapter.

This case is different in principle and application from the following cases:

Re: Winchester Estate, 140 Cal. 467, 74 Pac. 10.
Re: Cook's Estate, 187 N. Y. 253, 79 N. E. 991.

In the cases cited descendants of an "adopted" child were held to be lineal descendants of the deceased for the reason that the adoption had created the legal relation of parent and child in which the parties acquired all the rights and were subject to all the duties of that relationship. Such is not the legal situation in the case mentioned.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

INHERITANCE TAX—EXPENDITURE OF

June 14, 1930.

Mr. Leon Samuelson,
County Attorney,
Franklin, Nebraska.
Dear Sir:

In your letter of the 12th you ask our opinion as to whether inheritance tax money can be used by the county board for graveling county roads under Section 6170, Comp. Stat. of Nebr. 1922.

Section 6170, Comp. Stat. of Nebr. 1922, provides that inheritance tax money shall be expended "under the direction of the county board of each county, for the sole purpose of the improvement of the county roads. * * * All such permanent road-beds shall not be less than sixteen feet in width and shall be constructed of the most durable and approved material, and the remaining part of such road shall be constructed at one side of the permanent road and be used as dirt road," etc.

It is our opinion that this statute permits the expenditure of inheritance tax money for graveling of county roads.

The question, as we view it, is really one of fact, as to whether graveling is included under the term "durable and approved material." We are informed by officials of the state highway department that the department, and road engineers generally regard gravel surfacing as durable and approved material for the making of permanent roads.

Reference to Chapter 166, Laws 1929, Sec. 12, indicates that the legislature of 1929 regarded graveling as approved material for the construction of permanent roads as it is there specifically mentioned and specified as a method of constructing and improving roads authorized to be built and paid for out of the gasoline tax fund.

We are informed that the counties generally are using the inheritance tax fund for the purpose of graveling roads and that the statute is uniformly interpreted by county attorneys to permit this use of the fund.

Very truly yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

WILLS—PROVISIONS THEREIN AVOIDING BEQUESTS IF WILL CONTESTED, VALIDITY OF

February 20, 1930.

Mr. E. H. Whittemore,
Adams, Nebraska.
Dear Sir:

In your letter of February 18, you inquire as to the validity in Nebraska of a provision in a will to the effect "that a contest by a devisee or legatee will result in a reduction of their bequest or devise by a stated percentage or amount."

We are aware of no decision in Nebraska squarely upon this point. The great weight of authority however seems to be that such a provision is valid and is enforceable. The recent case of Shiffer v. Brenton, 226 N. W. 253 (Mich. 1929) contains an excellent review of the authorities both contra and accord.

You should by all means, however, see your lawyer concerning this matter.

Yours very truly,

C. A. SORENSEN, Attorney General,
By L. R. NEWKIRK, Assistant Attorney General.

INSANE PERSONS, CARE OF—LIABILITY

July 19, 1929.

Mrs. E. W. Johnson, Superintendent,
Board of Public Welfare,
Columbus, Nebraska.
Dear Madam:

The Board of Control has referred to this office for reply your kind letter of July 11, 1929, requesting information as to whether Platte

County is liable for the expenses of insane persons committed by the Platte County Insanity Board to the Hastings State Hospital, when the insane person or his relatives liable for his care are unable to pay the same.

If, at the time of committing the insane person, the Insanity Board found that person's legal settlement or residence to be in Platte County, then Platte County is liable for his expenses at the hospital. If, at said time of commitment the Insanity Board found the insane person's legal settlement or residence to be in some other county, they were required to so notify the County Board of that county, which, if its County Board found that said insane person had his legal settlement or residence in that county, would then become liable for his expenses at the hospital. If it is finally determined that the insane person is without a legal settlement in this state or that his legal settlement cannot be ascertained, then the state is liable for his expenses at the hospital (Sections 6908-6910, 6927, Compiled Statutes of Nebraska, 1922; State v. Douglas County, 18 Neb. 601; Clay County v. Adams County, 69 Neb. 106).

In Clay County v. Adams County, supra, the rule for assisting insanity boards and county commissioners in determining an insane person's legal settlement is laid down as follows:

> "The legal settlement of an insane person * * * is the county which would be primarily liable for the support of such person, if a pauper." Sections 5150 to 5154, Compiled Statutes of Nebraska, 1922).
>
> "If a person, neither insane nor a pauper, abandons his residence in one county and removes with his family to another, and settles in the latter with the intention of making it his home, and thereafter becomes insane, the latter county cannot recover of the former for expenses incurred on behalf of such insane person, unless it appears that he became a public charge, as an insane person, less than thirty days after abandoning his residence in the former county."

With the aid of these rules, it is believed that you will be able to satisfy yourself as to the county's liability for insane-hospital expenses of its residents in any case which you may have in mind.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

DEAD HUMAN BODIES—CLAIMS FOR—DISPOSAL OF

September 16, 1929.

Mr. Richard C. James,
County Attorney,
Falls City, Nebraska.
Dear Sir:

We have your letter of the 4th asking for our interpretation of Chapter 158, Laws of 1929, relating to disposal of dead bodies.

You state that a young lady from Falls City recently died in an insane asylum. The parents claimed the body for burial but are unable to bear the expense. No notice was given to the State Anatomical Board. You ask if the county board may lawfully grant aid from the county for the burial of the body.

The language of Section 2, Chapter 158, Laws of 1929, as you point out, seems to indicate that it was the intention of the Legislature that whenever a relative claimed the body within three days after death, the body should be surrendered and it is not necessary to give notice to the State Anatomical Board. The provision that the claimant of a body must assume all financial obligations relative to the disposal of such body seems to apply only to cases where fraternal or charitable organizations claim the body and not to cases where the body is claimed by relatives. In a former opinion this department ruled that relatives were not entitled to the body unless they assumed the financial burdens of burial, but upon a more careful examination of the language of the statute we believe this ruling was wrong.

It is our opinion, therefore, that it was the duty of the insane asylum to surrender the body to the parents, and that the county board may lawfully grant aid to the parents for the burial of the body.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

SCHOOL DISTRICT—TREASURER, LIABILITY OF FOR DISTRICT FUNDS—DEPOSITS IN BANKS

January 24, 1930.

Mr. John T. Phifer,
R. F. D. No. 4,
North Platte, Nebr.
Dear Sir:

In answer to your letter of inquiry of the 20th instant, I will say that in my opinion a district treasurer is liable for school money he deposits in a bank and which is lost because of the failure of the bank. I know of no provision of statute that authorizes the deposit of school district money in any bank.

The Supreme Court of this state has held, however, that

> "A banker by receiving on deposit from a school district treasurer funds known to be held by the latter in his official capacity becomes thereby a trustee for the beneficial owner with respect to such funds, and the same may, upon his insolvency, be recovered by the owner as a preferred claim against his estate." State v. Midland State Bank, 52 Neb. 1.

The extreme position taken by the court in this case was limited, however, to some extent in the more recent case of City of Lincoln v. Morrison, 64 Neb. 822.

Very truly yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

SCHOOL DISTRICT—WORKMEN'S COMPENSATION

April 10, 1930.

Supt. Glenn M. Kendall,
Harvard, Nebraska.
Dear Sir:

This is in answer to your letter of April 7, 1930, requesting information as to whether your school is liable for a doctor bill of one of its pupils who was injured by the breaking of a glass tube while at work in the laboratory.

She is not an employee of the school and hence is not protected by the Workmen's Compensation Act. As to the school's liability for

any negligence, it has been frequently held that the state and its political subdivisions are not liable for torts of their agents and employees (See Brownlee v. School District, Nebr., 27040, decided February 7, 1930; Kent v. State, 225 N. W. 672; Shear v. State, 223 N. W. 130).

It is, therefore, our opinion that said school district is not liable for said doctor bill.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

SCHOOL DISTRICT, ELECTIONS—PUBLICATION OF BALLOT

May 15, 1930.

Mr. R. J. Kopriva,
Snyder, Nebraska.
Dear Sir:

You inquire whether a sample ballot containing the names of the candidates to be voted on at a school district election is to be published just as a copy of the official ballot containing the names of candidates for municipal offices as arranged by the city clerk is to be published whether the publication is authorized by the school board or not.

In answer to the question you ask, I will say that I doubt whether the publication of a school ballot is required if it is not ordered by the school board.

I presume that in most cities or villages of considerable size a copy of the school ballot is ordered published by the school board.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

SCHOOLS—USE OF SCHOOL BUILDINGS FOR SOCIAL, RELIGIOUS AND POLITICAL MEETINGS

May 23, 1930.

Mr. George E. Mortensen,
2402 South 31st Street,
Omaha, Nebraska.
Dear Sir:

In your letter of May 20 you make inquiry as to the laws of this state relative to the use of public school buildings for social, religious and political meetings and as to the power of school boards in connection therewith.

Nebraska has aligned itself with the more liberal view in this country by making provision for the use of school buildings for public assemblages. In 1915 the state legislature enacted what is now Section 6554, Compiled Statutes of Nebraska, 1922, providing as follows:

> "The board of education of every school district in which is included any incorporated city or village may in its discretion permit the use of public school buildings for public assemblages under such rules and regulations as it may adopt. A majority of the qualified electors at any annual meeting in any rural school district may by resolution permit a similar use of school buildings within such district under rules and regulations which may be adopted at such annual school meeting, or in case none are adopted then under rules and regulations prescribed by the district board. The board of education may exact such rental as may be necessary to meet the expense of such meeting, restore the property and pay for extra help required. In rural school districts such rental may be fixed by resolution adopted at the annual school meeting, but in default of such provision the district board may fix the rental."

So far as we know this section has been construed only once by our Supreme Court. In the case of Brooks v. Elder, 108 Neb. 761, 189 N. W. 284, the court refused to grant an injunction to restrain the board of education of the North Platte School district from allowing the auditorium of the high school building to be used in connection with supervised dances under strict rules adopted by the board. That case contains an excellent discussion of the conflicting views entertained by the courts in this country concerning the use of school property for purposes not strictly educational in nature or not conforming strictly to the use of such property as a public educational institution.

The court criticised the famous case of Spencer v. Joint School District, 15 Kan. 259, 22 Am. Rep. 268, in which Judge Brewer, later a noted member of the United States Supreme Court, flatly held that school officials may be enjoined from leasing school property for gatherings and meetings. Our court in the Brooks case seemed to indicate its approval of the use of the North Platte high school auditorium for all sorts of athletic, social, patriotic and recreational purposes, and found no legal objection to the use of the property for supervised dances attended by the pupils of the high school and their families.

Certain difficulties are encountered, however, in connection with the use of school buildings for religious meetings. Our constitution provides in Section 4, Article I, that "no person shall be compelled to attend, erect or support any place of worship against his consent."

In the case of State ex rel Gilbert v. Dilley, 95 Neb. 527, 145 N. W. 999, our Supreme Court, in applying this constitutional inhibition, held:

> Syl. 1. "Holding Sunday school or religious meetings in a country schoolhouse so infrequently as not to exceed four times a year, and which do not interfere with the school work, does not constitute the schoolhouse a place of worship, within the meaning of section 4, art. I, of the constitution.
>
> Syl. 2. "The courts will not compel the school district board, by mandamus, to close the schoolhouse for the purpose of excluding such meetings, at the instance of a taxpayer who is not required to contribute anything whatever to the support of such meetings or the repair of the schoolhouse in which they are held."

In spite of the provisions of Section 6554, above quoted, this constitutional provision will govern in a case where it might be shown that religious meetings if frequently conducted and without full financial compensation to the school district make of school premises "a place of worship" which might be enjoined upon the behest of some taxpayer within the district. However, it is our view that if adequate rental is paid to the school authorities for the use of school buildings for religious meetings, it would be very difficult to set up any legal objection under the constitutional inhibition above mentioned, having in mind the well recognized modern tendency to open school premises to all sorts of public uses.

The question you ask is an important one calling in many instances for the highest degree of good judgment, tact and discretion on the part of the governing authorities of our school districts.

Yours very truly,

C. A. SORENSEN, Attorney General.

SCHOOL DISTRICTS—TAXATION, SITUS OF PROPERTY FOR

June 10, 1930.

Mr. W. G. Zutavern,
Dunning, Nebr.
Dear Sir:

You say:

> "Our ranch is in three different school districts all in one body, and the buildings are in Dist. No. 9. Our stock runs mostly the year around in Dist. 27 and are always there the first of April, and the assessor has always made out two separate schedules.
>
> "We always have what stock is in Dist. 9 on the first of April assessed in that Dist."

and you ask in which school district your live stock should be assessed.

In answer to your question, I will say that in my opinion your live stock should be assessed in the district of your residence that is to say in School District No. 9.

Section 5915, Compiled Statutes, provides among other things that

> "Personal property * * * shall be listed and assessed in the school district where the owner resides."

There are exceptions to this rule but your case does not come within any of the exceptions.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

SCHOOL DISTRICT—BOARD, VACANCY BY TRANSFER OF MEMBERS TO ANOTHER DISTRICT

June 19, 1930.

Mrs. Gertrude Nelson,
County Superintendent,
Sidney, Nebr.
Dear Madam:

You say:

> "I am requested to secure an opinion from you relative to the new school transfer school law.
>
> "I sent out notices last year regarding the necessity of transferred persons going off of the school board. I find that two transferred persons are still on the school board, giving as their reason that they were elected before the new law went into effect, and as they each have one more year to serve they object to resigning."

In answer to the question you ask, I will say that in my opinion the parents or guardians of children who have been transferred temporarily for school purposes to an adjoining district are not eligible to hold the office of member of the school board of the district to which the temporary transfer is made. I think the other members of the board may treat the matter as though a vacancy had occurred and appoint some one to fill the vacancy or the vacancy may be filled at a special election called for that purpose, but if no one is elected or appointed to fill the vacancy and such a person is allowed to serve, his official acts will be valid for he will be an officer de facto.

Very truly yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

SCHOOL DISTRICT—SCHOOL SITES, TITLE TO

June 25, 1930.

Mr. Andrew Johnson.
Emmet, Nebraska.
Dear Sir:

You inquire:

> "Should a school site in this state have a deed or lease or is it lawful to go without either?
>
> "If the district owns a school site and then removes the schoolhouse, to whom does the school site belong. Does it go back to the one who owns the joining land, or can the school district sell it to some other party?"

I will endeavor to answer your questions in the order in which they are asked.

The district should have either a deed or a lease of the schoolhouse site.

Section 6328, Compiled Statutes reads as follows:

> "The district shall not in any case build a stone or brick schoolhouse upon any site without having first obtained a title in fee to the same; and also they shall not in any case build a frame schoolhouse on any site for which they have not a title in fee without the privilege to remove the same when lawfully directed to do so by the qualified voters of the district at any annual or special meeting."

If the district owns a school site in fee the title to the land does not revert to the original owner when the schoolhouse is removed but remains in the district which may sell it if it sees fit to do so, but sometimes the district has merely a lease with a provision that it shall revert to the grantor when it is no longer used for school purposes, then the district cannot sell it for it loses what interest it formerly had in it when the schoolhouse is removed.

Yours very truly,

C. A. SORENSEN, Attorney General,

By GEORGE W. AYRES, Assistant Attorney General.

SCHOOLS—COURSES—INSTRUCTION ON ALCOHOLICS AND NARCOTICS

June, 25, 1930.

Reverend Leon C. Hills,
2303 K Street,
Omaha, Nebraska.
Dear Sir:

This is in answer to your kind letter of June 20, 1930, requesting information as to the comparative extent of the state superintendent and the local school boards authority in prescribing the course of study in public schools on "the effects of alcoholic drinks and other stimulants and narcotics on the human system." You also inquire:

> "In case the school board gives instruction to its teacher to teach the dangers of alcohol and narcotics in the course of chemistry only, and this is left to the discretion of the teacher would this meet the requirements of the law when there is no chemistry taught in the lower grades."

Upon these questions all of the pertinent law appears to be embodied in the following quotations from Sections 6385 and 6446, Compiled Statutes of Nebraska, 1922:

> "The course of study for the first eight grades in common schools shall be composed of the following subjects: 'Agriculture, bookkeeping, civics, drawing, arithmetic, English composition, geography, grammar, history, mental arithmetic, orthography, penmanship, physiology, reading. The state superintendent with these subjects for a foundation shall lay out a feasible course of study adapted to rural school conditions keeping in view the good of a thorough education for the child in these branches rather than to the completion of the course in a given number of years."

> "Provisions shall be made by the proper local school authorities for instructing the pupils in all schools supported by public money, or under state control, in physiology and hygiene with special reference to the effects of alcoholic drinks and other stimulants and narcotics on the human system."

We fail to find any law providing for the enforcement of the state superintendent's course of study literally as laid down by him. We, therefore, conclude that, so long as instruction in the courses prescribed by statute is in fact given, compliance with the state superin-

tendent's course of study is advisory or directory rather than mandatory.

We also fail to find any law prescribing just what provisions the local school authorities shall make for physiology and hygiene instruction on the harm to the human system of alcoholic drinks and other stimulants and narcotics. And, of course, the law lays down no itinerary or detailed specifications as to how this instruction shall be imparted. We, therefore, conclude that, so long as this subject-matter is in fact taught in connection with physiology and hygiene, the local school authorities have full discretion as to the nature, extent and methods of such instruction, whether by leaving it to the teacher or giving her specific directions in that behalf. However, since the command of the statute is to give the instruction referred to in connection with the courses on physiology and hygiene, we question the authority of the board to order such instruction given in the chemistry course only which may not reach the first eight grades at all.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

SCHOOL DISTRICTS—CONTRACTS, EXECUTION OF

July 15, 1930.

Mr. I. O. Hotaling,
Elgin, Nebraska
Dear Sir:

In answer to your letter of inquiry of the 28th ultimo, I will say the law provides that if a contract is made before the annual school meeting it must be signed by two members of the board whose terms do not expire with the school year in which such contract is made. (Section 6314, Compiled Statutes).

The statute does not place such a restriction upon a contract made after the annual meeting, but it will be well to have at least two members of the board who will be in office during the term of the contract, sign it.

Yours truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

SCHOOL DISTRICT—LETTING OF BIDS FOR SCHOOL HOUSE

July 29, 1930.

School Board District No. 15,
Merna, Nebraska.
Gentlemen:

You state that you are about to let bids for the rebuilding of your school house which was partially destroyed by a cyclone. You ask if it will be necessary to advertise for bids, and if so, for how long.

Section 6284, Compiled Statutes for 1922 provides:

> "The provisions of Sections 75, 76, 77 and 78 of Chapter 8 of the Revised Statutes of 1913 (Sections 356, 357, 358 and 359, Comp. St. 1922), relating to special funds for erection of court houses shall apply so far as practicable to the procedure under this section, the school board or district trustees having power to contract for the erection of the proposed building **under the same restrictions as the county board in case of the erection of a court house** and any residue of such tax going into the school district general fund."

Section 362, Compiled Statutes for 1922, relating to the erection of court houses, provides:

> "It shall be the duty of the county board, immediately after said levy is first ordered, to take the necessary steps for securing plans and specifications for said court house or jail, **and for the advertising and letting of contracts** and fixing of terms and conditions of bond for its erection, in the manner which, in their judgment, will secure the best results for the county."

There appears to be no statutory requirement as to the manner of advertising for bids, or length of time, but this seems to be left to the judgment of the school board in the manner that will "secure the best results" for the school district.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By HOMER L. KYLE, Assistant Attorney General.

SCHOOL DISTRICT—ELECTION OF TEACHERS

August 12, 1930.

Honorable Charles W. Taylor,
State Superintendent,
State House,
Lincoln, Nebraska.
Dear Sir:

You say:

"An official in an Article XXV school writes this office as follows:

"'A superintendent, at the election of teachers, nominates Anne Doe for a teaching position. The School Board fail to elect her by a vote of three to three. Another teacher is elected to fill this vacancy. All positions are filled, and the Board spread on their minutes a motion giving the superintendent authority to fill all vacancies which may occur during the summer by resignation.

"'In August a resignation is presented to the Board and accepted. The superintendent appoints Anne Doe to fill the vacancy. Three members of the Board object to the teacher, Anne Doe. Is the teacher, Anne Doe, a legally elected teacher by the appointment of the Superintendent? Can Ann Doe collect her salary if three members fail to vote for allowing the salary? Can the School Board delegate their power to elect teachers to the Superintendent without the Superintendent's selection being approved by the Board? Can a teacher thus selected draw.. school district money?'

"First: What is your opinion of the above situation in an Article XXV school?

"Second: Would the same opinion hold good for school organized under Article VI and other types of organization providing six members on the board of education?"

In answer to the questions you ask, I will say that in my opinion it takes a majority of the school board to elect a teacher in either an Article XXV or an Article VI school. I do not think a school board can delegate its authority to elect teachers to a person who is not a member of the board even though that person is the superintendent of their schools. The board can act of course, upon the suggestion of the super-

intendent in electing their teachers but the ultimate authority is in the board and not in the superintendent of their schools. I do not think the teacher Anne Doe is legally elected if one-half the school board vote against her after she has been selected by the superintendent.

Respectfully submitted,

C. A. SORENSEN, Attorney General.

SCHOOL DISTRICTS--PUBLIC LIABILITY

August 27, 1930.

Mr. J. M. Frazer,
Lewiston, Nebraska.
Dear Sir:

This is in answer to your kind letter of August 21, 1930, in which you state and inquire:

> "Please advise if in the transportation of school pupils by a school district the district is liable under the law for injuries or death to pupils arising out of an accident while being so transported.
>
> "We have been carrying liability insurance to cover such cases and we desire to know if it is necessary or good business to do so."

A negative answer to your first question is required by the repeated decisions of the Supreme Court of Nebraska that, in the absence of some statute expressly making the state and its political subdivisions, including school districts, liable for torts, they are not liable for the injury or death you describe. (See Kent v. State, 225 N. W. 673; Shear v. State, 223 N. W. 130; Brownlee v. School District, 228 N. W. 937).

An affirmative answer to your second question is required, if you are a consolidated school district, by Section 6576, Compiled Statutes, 1922, making the driver of the transporting vehicle liable in damages for injuries to pupils due to his negligent operation of the vehicle and requiring him as security for such liability to give a bond, the premium of which is to be paid out of the school district treasury. For failing to enforce this requirement, if injury or death resulted to any pupil in transportation by the district the directors might be held liable for negligence.

With kind personal regards, we are

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

STATE UNIVERSITY—COMPULSORY MILITARY TRAINING

August 29, 1930.

Mr. Stanley J. Mengler,
Alexandria, Nebraska.
Dear Mr. Mengler:

Your letter of August 26th at hand in which you ask if there is any provision in the State Statutes or the University charter which makes it incumbent upon the university authorities to enforce compulsory military training.

There is nothing in the laws of the State of Nebraska or the university charter to enforce compulsory military training. The matter rests entirely with the Board of Regents and the Chancellor. The Attorney General of the United States has recently given an opinion that the Morrill Land Grant Act does not make military training compulsory in schools and universities which receive financial aid under that Act.

Very truly yours,

C. A. SORENSEN, Attorney General.

SCHOOLS—COUNTY SUPERINTENDENT, QUALIFICATIONS FOR OFFICE

September 5, 1930.

Miss Thelma E. Lawler,
Harrison, Nebraska.
Dear Madam:

You inquire whether the holder of a second grade state high school certificate is eligible to hold the office of County Superintendent provided that he or she possesses the other necessary qualifications for that office.

My answer to your question is yes. Section 6463, Compiled Statutes as amended by Chapter 93, Session Laws of 1929 provides among other things that

> "No person shall be eligible to the office of county superintendent who does not hold at least a Nebraska permanent elementary school certificate issued in this state and in force at the time of his election."

The requirements for a Nebraska permanent elementary school

certificate are a Nebraska third grade elementary school certificate of equal or higher rank and two years (sixty semester hours) of college work. The grade of certificate is valid in kindergarten to eighth grade inclusive in any school in the state.

The requirements for a Nebraska second grade high school certificate also require sixty hours of college work or a Nebraska third grade elementary school certificate or a certificate of equal or higher rank and a minimum grade of eighty per cent earned upon state examination in thirteen enumerated subjects.

This class of certificate is valid in any school in the state and is not limited to the eighth and lower grades. Is there any reason for believing it is not at least the equivalent of a Nebraska permanent elementary school certificate?

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

SCHOOLS—CONTRACTS, INTEREST OF OFFICERS THEREIN

September 17, 1930.

Mr. W. V. Steuteville,
Attorney-at-Law,
Sioux City, Iowa.
Dear Sir:

Your letter of September 9th at hand.

Section 6334, Compiled Statutes of Nebraska, 1922, reads as follows:

> "No school officer shall be a party to any school contract for building or furnishing supplies, except in his official capacity as a member of the board."

Section 6601, Compiled Statutes of Nebraska, 1922, reads as follows:

> "It shall be unlawful for any member of the board of education to have any pecuniary interest either directly or indirectly, in any contract for the erection of schoolhouses, or for warming, ventilating, furnishing or repairing the same, or be in any manner connected with the furnishing of supplies for the maintenance of the schools."

Under this law as interpreted by the courts, a member of the school board does not have the right to be interested directly or indirectly in the sale of supplies to the school district. This is a harsh law but the legislature for some reason or other thought it a good public policy.

Sincerely yours,
C. A. SORENSEN, Attorney General.

SCHOOLS—TRANSPORTATION OF PUPILS

December 3, 1930.

Mr. P. E. Exstrom,
Supt., Brady Public Schools,
Brady, Nebraska.
Dear Sir:

You ask:

> "Does a board of education legally have a right to pay more than five cents for each quarter of a mile or fraction thereof for transportation to a resident of the district who lives more than three miles from the schoolhouse?"

In answer to your question I will say that in an ordinary school district I do not believe the district has any authority to pay more than the five cents per quarter mile provided for by Section 6508 (b).

In a consolidated school district a greater sum may be paid under the provisions of Section 6576, Compiled Statutes, and such payment may be paid for distance traveled where a rural pupil does not reside three miles from the school house.

Of course even in a consolidated district only reasonable compensation should be allowed a parent for a transportation of his children to and from school.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

INHERITANCE TAX, STATE—CREDIT ON FEDERAL INHERITANCE TAX

April 26, 1929.

Hon. Harry W. Scott,
State Tax Commissioner,
State House,
Lincoln, Nebraska.
Dear Sir:

You inquire whether the estates of persons who died prior to April 5, 1929, that being the date upon which House Roll 319 recently passed by the Legislature with an emergency clause was approved, are subject to a state inheritance tax.

The correct answer to the question you ask is not entirely free from doubt. If it was a question as to when estates which were free from any inheritance tax before the passage of the act became subject to same I would say the estates of persons who died prior to its passage were not subject to its provisions.

> "Generally a right of inheritance, or of taking an estate, interest, legacy or devise becomes fixed at the death of the testator or interstate, and is not taxable under a law enacted after that event."
>
> 37 Cyc. 1557.

House Roll 319, does not, however, increase the amount of estate or inheritance tax levied against any estate. It merely provides in effect that a part of such tax shall be paid to the state. It was passed to take advantage of the provision in the Federal law that the tax imposed upon estates by the United States "shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory."

This being true, there will be no impairment of the vested rights of individuals if the law is so construed as to make it applicable to estates of persons who died prior to its enactment where such estates have not yet been settled and the amount of the State Tax has not yet been paid to the United States.

In the absence of any court decision holding otherwise I am of the opinion that officers charged with the collection of the tax will be justified in acting upon the assumption that the law was intended by the Legislature to be applicable in cases where the estates of decedents were not yet settled and no estate tax had yet been paid to the United States at the time of its passage even though such decedents may have died shortly prior to its passage.

Respectfully submitted,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

COUNTY BOARD—MEETINGS—PAUPERS, CARE OF

November 7, 1929.

Mr. John Ashford,
Winnebago, Nebraska.
Dear Sir:

This is in answer to your kind letter of October 30, 1929, requesting information as to extent to which county commissioners must act as a body in granting county aid to the poor; and as to the limit, if any, of taxes and expenditures by the county for the support of the poor.

Except in a regular or special meeting at the county seat the county board can transact no county business. County business includes the passing of orders or motions for the expenditure of county money, which in turn includes county money spent for the relief of the poor. (See Sections 852 and 881, Compiled Statutes of Nebraska, 1922, as construed in Morris v. Merril, 44 Neb. 423, and Merrick County v. Batty, 10 Neb. 176). It is, therefore, our opinion that in the actual payment of county money for the relief of paupers the board should act by motion as a body in a regular or special meeting at the county seat.

The entire law on the subject of paupers is Sections 5140-5167, Compiled Statutes of Nebraska, 1922. We fail to find any decisions of our Supreme Court construing this law and answering the precise questions you ask. However, you will note by Sections 5142 and 5143 that a pauper is available for county aid not only when the relatives are of insufficient ability to help him but also when the relatives "fail or refuse to maintain said pauper"; and that the board is "vested with the entire and exclusive superintendence of the poor in such county."

In view of the practically unlimited power of the Board in relieving the poor, we see no legal objections to the action of the Board in exercising this power by allowing each commissioner to supply or arrange to supply the needs of the poor in his own district; so long, of course, as the claims against the county treasury for relief of the poor are finally voted on by the board as a body or as a whole in a regular or special meeting at the courthouse. To place upon the board's powers with reference to paupers the further limitations, which you apparently desire, will, in our opinion, require legislation.

The law specifies that payments for the relief of the poor are to be made out of the county treasury (Sec. 5142 and 5146). We find no provision of law, except the poor-house levy (Sec. 5158), for a special tax levy, the proceeds of which are to be used exclusively for the relief of the poor. We are, therefore, of the opinion that payments for the

relief of the poor are legally made out of the general fund, or moneys raised by the county by taxation for general revenue purposes. The limit of such taxation for general county purposes is fifty cents on the hundred dollars of actual valuation in the county. (Sec. 5, Art. VIII, Constitution of Nebraska; Secs. 854 and 855, Compiled Statutes of Nebraska, 1922). Taxes in excess of this limit must be authorized by vote of the people of the county and be expended exclusively for the purposes for which the taxes are levied (Sec. 855, Compiled Statutes of Nebraska, 1922). Within these limits, it is our opinion that the Board may legally expend from the county general fund for the relief of the poor whatever sums it deems necessary or expedient.

Sincerely yours,

C. A. SORENSEN, Attorney General,
By CLIFFORD L. REIN, Assistant Attorney General.

INHERITANCE TAX—"ACKNOWLEDGED RELATIONSHIP"

July 8, 1929.

Mr. William F. Spikes,
County Attorney,
St. Paul, Nebr.
Dear Mr. Spikes:

Your letter of July 2 at hand in which you state:

"There has arisen in our county a rather close question with regard to the application of the state inheritance tax law. This question has to do with Section 6153, Compiled Statutes of 1922, as amended by Chapter 187 of the Session Laws of 1923, Page 430. The section in part reads as follows: 'When the beneficial interests to any property or income therefrom shall pass * * * to any person to whom the deceased for not less than ten years before death stood in the acknowledged relationship of a parent, * * * in every such case the rate of tax shall be $1.00 on every $100.00 * * *, the taxes to be levied in the above case only upon the excess of $10,000 received by each person'.

"In our county a lady by the name of Anastasia Kwarcinski took into her home a little child of the name of Christine Deleski. The lady reared the child in her home and called her her daughter, and the child always called the lady her mother. The child was never adopted by the lady, although they oc-

cupied the usual relationship of parent and child. I do not believe the woman ever stated that the child was actually her own child, but they simply occupied the usual relationship of parent and child.

"The lady died recently leaving practically all of her estate to the child whom she had reared. The child had lived with this lady practically all of her life and for about twenty years.

"It happens that the child was also a niece of her benefactors and if she does not come within the class of a child of the deceased, she would come within the class of a niece. The niece would be entitled to only $2000 exemption from tax and the rate would be 4%. Whereas the child is exempt from $10,000, and the rate is 1%. Please let me know in which class we shall place this heir."

In our opinion this child for the purpose of the payment of inheritance tax should be treated as a niece and not as a daughter of the deceased. The word "acknowledged" is never applied to the admission of a fiction but only in relation to a disputed fact, so when a disputed fact is spoken of as being acknowledged it means that the fact exists and its existence is acknowledged—In re Hunt's Estate, 33 N. Y. Supp. 256, 86 Hun. 232; Blythe v. Ayres, 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40. The child in question was not a daughter of the deceased and as I understand it no one claims that she was a daughter, therefore the deceased could not make her a daughter by acknowledging her as such.

Very truly yours,

C. A. SORENSEN, Attorney General.

OFFICERS—HOLDING TWO OFFICES—RULE OF INCOMPATABILITY

September 12, 1929.

Mr. E. T. N. Alford,
Justice of the Peace,
Cairo, Nebraska.
Dear Sir:

You inquire whether a Justice of the Peace can also hold the office of Precinct Assessor. I find no provision of statute which in express terms bars a man from holding at the same time the office of Justice of the Peace and the office of Precinct Assessor. In the absence

of any statutory or constitutional provision the rule at common law is that

> "The holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of the two offices are inconsistent, they are regarded as incompatible."
>
> 46 C. J., pp. 941, 942.

No reason occurs to me at this time why the two offices should be held to be incompatible, but the question is not entirely free from doubt in the absence of a supreme court decision upon that point. If the Justice of the Peace however is permitted to act as Precinct Assessor he will be at least a de facto officer in each position and his official acts will be valid. I will add that if the two offices are incompatible the acceptance of the office of Precinct Assessor vacates as a matter of law the office of Justice of the Peace. If he continued to serve as Justice of the Peace he would be a de facto Justice and his acts would be valid as being the acts of a de facto officer.

Very truly yours,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

SCHOOLS—SECTARIAN SCHOOLS NOT ENTITLED TO SHARE IN STATE SCHOOL FUNDS

March 15, 1930.

Mr. P. F. O'Gara,
Attorney at Law,
Hartington, Nebr.
Dear Sir:

In answer to your letter of the 7th instant in re the controversy that has arisen between School District No. 6 of Cedar County and the State Superintendent, regarding the right of said district to share in an apportionment of the state school funds, I will say that I am unable to say that as a matter of strict law the State Superintendent exceeded his authority in refusing to allow said school district a share in the state apportionment, and in refusing to include it in the list of school districts which have been approved by his office as schools qualified to grant free public high school education to non-resident

pupils under the provision of the so-called "Free High School Education Act."

The State Superintendent as you are aware is authorized to decide disputed questions of school law in the first instance. The statute provides that "He shall decide disputed points in school law and all such decisions shall be held to have the force of law until reversed by the courts."—Section 6477, Comp. Stat. 1922.

In the instant case as I understand it the following facts are undisputed, viz: That School District No. 6 of Cedar County, Nebraska, is now and has been for many years a regularly organized public school district; that it has a school board regularly elected to manage its affairs and among other things to employ its teachers; that for some years it has employed as its teachers nuns of the Catholic faith who wear in the school room and while engaged in the discharge of their duties therein, sectarian dress or garb peculiar to their order; that this is known to the school board who have made no attempt to interfere with the wearing of a sectarian garb in the school room by the teachers employed by it; that the school house belonging to the district is in a dilapidated condition and unfit for use; that for several years the district has been renting rooms for school purposes in a building owned by a Roman Catholic parish; that the teachers employed are women of culture and refinement; that they hold teacher's certificates granted by the State; that until recently a crucifix and other symbols of the Catholic faith have been prominently displayed in the school rooms rented and occupied by the district for pupil school purposes and that religious instruction in the tenets of the Catholic faith is given in those rooms beginning at the hour of 8:30 A. M.

With these facts which I take it are undisputed in mind, and having in mind also the provisions of Section 11 of Article VII of the Constitution of Nebraska, which provides among other things that "No sectarian instruction shall be allowed in any school supported in whole or in part by the public funds set apart for education purposes. * * * Neither the state legislature nor any county, city or other public corporation * * * in aid of any sectarian or denominational school * * * or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof," and having also in mind the provisions of Sections 6454 and 6455 of the Compiled Statutes which read as follows:

> "Any teacher in any public school in this state who shall wear in said school or while engaged in the performance of his or her duty any dress, or garb, indicating the fact that such

teacher is a member or an adherent of any religious order, sect or denomination, shall upon conviction thereof, be deemed guilty of a misdemeanor and fined in any sum not exceeding one hundred ($100) dollars and the costs of prosecution or shall be committed to the county jail for a period not exceeding thirty days or both.

"In case of violation of section 1 of this act by any teacher employed in any public school, notice of which having been previously given to the school board, board of education or board of directors employing such teacher, it shall be the duty of such school board, board of education or board of directors to suspend such teacher from employment in such school for the term of one year. In case of the second offense by such teacher, it is the duty of the board of education, board of directors or school board to disqualify permanently such teacher from teaching in such school and any public school director, member of a board of education or school board who fails to comply with the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred ($100) dollars and costs of prosecution."

the State Superintendent made his ruling. There is authority I think in support of his position.

"According to some decisions the wearing of a costume, distinctive of some religious order, by teachers in the public schools is violative of a constitutional provision forbidding the use of public money in support of any school or institution in which any sectarian doctrine is taught. Consequently an order of a state superintendent of schools forbidding the wearing of any sectarian costume by teachers is valid. Such a regulation applies prospectively to teachers teaching under valid pre-existing contracts, and as so applied is not open to the objection that it annuls those contracts. A teacher in a public school is not entitled to compensation for services rendered by her while wearing a sectarian garb after the establishment of a regulation prohibiting teachers from wearing such garb, though the services were rendered under a valid contract executed before the establishment of the regulation. But a board of school directors cannot be enjoined from employing teachers exclusively of one religious sect; * * * A statute prohibiting the wearing of a distinctive religious garb by any teacher in the public schools is constitutional. Such a statute is not subversive of

religious liberty, for it undertakes to control acts and not beliefs."—24 R. C. L. 663.

The Court of Appeals of the State of New York has said:

"A regulation established by such superintendent prohibiting teachers in public schools from wearing a distinctly religious garb while engaged in the work of teaching therein, is a reasonable and valid exercise of the power conferred upon him, not because the wearers of such apparel should be excluded from teaching in the public schools on account of their religious convictions or membership in religious orders, since, if otherwise qualified and by their acts as teachers they do not promote any denominational doctrine or tenet, there is no reason, morally or legally, why they should be disqualified, but because the influence of such apparel is distinctly sectarian, even if the wearing of it does not amount to the teaching of denominational doctrine, and the prohibition is in accord with the public policy of this state is a valid enactment. If it is, the State Superintendent forbidding the use of the property or credit of the state in aid of sectarian influences.

"A refusal by teachers employed in a public school to comply with such regulation after notification thereof, forfeits their right to further compensation under their contract of employment, since one of the implied obligations of such contract is to obey all reasonable regulations as to the management of the school made by the superintendent, and, therefore, a contention that he had no power to annul it is without force."—184 N. Y. 421.

A law which forbids the wearing of a sectarian garb by a teacher in the public schools of Pennsylvania was upheld by the Supreme Court of that state. (See Commonwealth v. Herr, 229 Pa. St. 132).

I am therefore of the opinion that the law forbidding the wearing of a sectarian garb in the school room by a teacher in the public schools of this state is a valid enactment. If it is, the State Superintendent might have revoked the certificates of the teachers offending against its provisions, for it is provided by statute that "crime against the state" shall be a proper cause for the revocation of a teachers certificate.

I do not wish to be understood as saying or implying that the teachers who wore the forbidden garb while teaching in a public school

were guilty of any act of moral turpitude. On the contrary, I assume and believe they were women of high moral character who would not consciously do what they believed to be morally wrong, but the fact remains that they knowingly violated a state law and commited an act which was a crime against the state, if the act in question is valid as I assume and believe it is.

The fact that the State Superintendent did not revoke their certificates as he might have done, and that neither they nor the members of the district school board were prosecuted by the local authorities as they might have been, for a gross violation of a state law, does not in my opinion absolutely bar the State Superintendent from asserting that the school over which they presided was not entitled to a share of the state school funds.

Yours very truly,

C. A. SORENSEN, Attorney General,
By GEORGE W. AYRES, Assistant Attorney General.

GAMBLING—PARI-MUTUEL BETTING

June 3, 1929.

Mr. Chas. R. Gardner, Secretary,
Ak-Sar-Ben Exposition Company,
Omaha, Nebraska.
Dear Sir:

Many complaints are coming to this office concerning the gambling on horse races at your Spring Running Race Meeting. This betting as we understnad it has been organized by and is under the supervision of your organization which receives a certain percentage of all bets made. Some of these complaints come from civic leaders who say that this wholesale gambling tends to demoralize the young people. A number of business men complain on the ground that the money spent on gambling makes collections hard and drains the city of millions of dollars that otherwise would be spent with the merchants and business men of Omaha. The statement is made that sometimes as high as seventy-five thousand dollars in one day is gambled away at the race tracks. Parents whose sons have lost considerable sums at the races also complain. It is alleged that several young men last year lost from one hundred dollars to five hundred dollars. A few complaints have also been made about the number of women who are spending their time at the races gambling.

We have a high regard for yourself and the other officials of your organization and we dislike exceedingly to appear intrusive but we

cannot grant an exemption to your organization from the gambling laws of the state. The fact that the profits that your organization gets out of this gambling are used for a worthy purpose does not alter the situation. We cannot sanction one law for your group and another law for others. Having closed the large gambling houses in Omaha and in other parts of the state, this office to be consistent must also decline to approve horse race gambling. If we did not we could rightfully be charged with discrimination. We are a firm believer in equality before the law, the State's motto, regardless of whom it effects.

Therefore, please suppress and cause to be stopped all betting under your auspices on horse races. Such betting whether pari-mutuel or otherwise in the opinion of this office is unlawful and those in charge of the same are subject to prosecution.

In order that you may have the legal basis for this opinion we call your attention to the following sections of the Nebraska statutes:

> "Whoever, at any time, plays in any ordinary tavern or race field, or in any booth, arbor, outhouse or other erection connected with such tavern, ordinary or race field or at any other public place, at any game whatsoever, except games of athletic exercise, or bets or wagers on the hands or sides of such as do play as aforesaid, shall pay a fine in any sum not exceeding one hundred dollars.
>
> "Whoever suffers any game or games whatsoever to be played for gain upon or by means of any gaming device or machine of any denomination or name, in his, her or their house, or any outhouse, booth, arbor or erection, of which he, she or they have the care or possession, shall each pay a fine of not less than fifty nor more than two hundred dollars.
>
> "If any keeper or keepers of any tavern, ordinary or other house of public resort shall suffer any game or games whatsoever, except games of athletic exercises, to be played at or within such tavern, ordinary or house of public resort, or in any outhouse, building, or erection appendant thereto, every such keeper or keepers shall pay a fine of not less than fifty nor more than two hundred dollars.
>
> "Whoever shall play at any game whatever for any sum of money or other property of value, or shall bet any money or property upon any gaming table, bank or device, prohibited by law, or at or upon any other gambling device, or who shall bet

upon any game played at or by means of any such gaming table or gambling device, shall, upon conviction, be fined in any sum not less than one hundred dollars, and not exceeding three hundred dollars, or be imprisoned in the penitentiary not more than one year; and upon a second or any subsequent conviction shall be fined in any sum not less than three hundred dollars and not exceeding five hundred dollars, or be imprisoned in the penitentiary not more than two years: Provided, if any person or persons shall lose any property or money in a gambling house or other place, either at cards or by means of any other gambling device or game of hazard of any kind, such person, the wife or guardian of such person, his heirs, legal representatives or creditors, shall have the right to recover the money or the amount thereof or the property or the value thereof, in a civil action, and may sue each or all persons participating in the game, and may join the keeper of the gambling house or other place in the same action, who shall be jointly and severally liable for any money or property lost in any game or through any gambling device of any kind; and no title shall pass to said property or money; and in any action to recover the same no evidence shall be required as to the specific kind or denomiation of money but only as to the amount so lost.

"Whoever shall set up or keep any gaming table, faro, bank, keno or any other kind of gambling table or gambling device or gaming machine of any kind or description, under any denomination or name whatsoever, adapted, devised and designed for the purpose of playing any game of chance for money or property, except billiard tables, or who shall keep any billiard table for the purpose of betting or gambling, or shall allow the same to be used for such purpose, shall, upon conviction, be punished by a fine of not less than three hundred dollars, and not exceeding five hundred dollars, or be imprisoned in the penitentiary not exceeding two years.

"Whoever keeps a room, building, arbor, booth, shed or tenement, canal boat, or other water craft to be used or occupied for gambling or knowingly permits the same to be used or occupied for gambling, or, being the owner of any room, building, arbor, booth, shed or tenement, canal boat or other water crafts, rents the same to be used or occupied for gambling, shall be fined in any sum not less than thirty nor more than five hundred dollars, or be imprisoned in the county jail not less than ten nor more than thirty days, or both; and if the owner of any room, building, arbor, booth, shed or tenement, canal boat or other water craft, shall know that any

gaming table, apparatus or establishment is kept or used in such room, building, arbor, booth, shed or tenement,, canal boat or other water craft, for gambling and winning, betting or gaming money or other property, and shall not forthwith cause complaint to be made against the persons so keeping and using such room, building, arbor, booth, shed or tenement, canal boat or other water craft, he shall be taken, held and considered to have knowingly permitted the same to be used and occupied for gambling.

"Whoever opens, sets on foot, carried on, promotes, makes or draws, publicly or privately, any lottery or scheme of chance, of any kind or description, by whatever name, style or title the same may be denominated or known; or by such ways and means exposes or sets to sale any house or houses, lands or real estate, or any goods or chattels, cash or written evidences of debt, or certificates of claims or any thing or things of value whatever, shall be fined in any sum not exceeding five hundred dollars."—Sections 9799-9804, 9818, Compiled Statutes of Nebraska for 1922.

Only parts of some of these sections are applicable but you will note that the Legislature tried to cover every possible kind of betting and gambling. Section 24, Article 111 of the State Constitution reads as follows:

"The Legislature shall not authorize any games of chance, lottery, or gift enterprise under any pretense, or for any purpose whatever."

In the face of this constitutional provision neither pari mutuel wagering nor any other form of gambling could be legalized by the Legislature.

In Webster's New International Dictionary, pari mutuel or "paris mutuels" is defined as "A form of betting on horses in which those who bet on the winning horse share the total stakes less a small per cent to the management." In Funk and Wagnall's New Standard Dictionary, "paris mutuels" is more completely defined as "A pool in betting, as in a horse race, in which each better lays a fixed sum on the contestant that he selects, and those who choose the winners divide the entire stakes, less the percentage of the person who furnishes the pool-tickets; literally, mutual bets." The dictionary definitions seem to leave no room for doubt but that, whatever else it is, pari mutuel, or paris mutuels, or paris mutuals, is a bet or form of betting forbidden by Nebraska Statutes and constitutes an illegal nuisance.

The statutory prohibitions of games of chance and of contrivances used in betting have been held both broad enough and specific enough in other states to include pari mutuel betting. Thus, in Pomono Horse Club v. State of Fla., 111 S. 801, 1927, pari mutuel betting on horse races was held to be a game of chance or gambling under statutes prohibiting the same. The same result was reached in Commonwealth v. Simonds, 79 Ky. 618, wherein it was held that the setting up, exhibiting and keeping of a paris mutuel machine violated a criminal statute against 'contrivances used in betting."

In this case, the court said arguendo:

> "It is true, the operator or owner of the machine, by receiving five per cent certain, without regard to the issue of the race, is not guilty of gaining or betting in a technical sense, because he hazards nothing; but the ticket buyers are engaged in unlawful betting, whereby they either win the money of the other ticket buyers or lose their own, and the machine is used by the ticket buyers in betting, and the operator or owner of the machine sets it up, exhibits and uses it for the ticket buyers, and to aid them in unlawful betting, whereby they win money or lose money, and we are therefore of the opinion that the evidence shows in this case that the accused set up, exhibited and used the machine know as 'French pool', that it is a contrivance used in betting, by which betting money or other thing is or may be won or lost, and it is within the description of the statute."

Parì mutuel betting was introduced into England a few years ago and declared to be an instrument of wagering (Tallett v. Thomas, Law R. 2 B. 514-521).

It is not unlawful gambling of course to contribute a prize to be given to the winner in any contest (27 Corpus Juris 1004, Note 56; 27 Corpus Juris 1000-1001, Note 79). But, by the weight of authority, it is unlawful gambling to contribute to a prize to be wholly given back to those contributors selecting and staking their contribution on the winning contestants (27 Corpus Juris 100, Notes 72 ad 73). There is therefore in our opinion no valid Nebraska statute authorizing pari mutuel betting or other horse race gambling. This office has come to this conclusion after much research.

Much as we dislike the criticism that will come from this interference on our part with your enterprise, we cannot turn a deaf ear to the demand for law enforcement as to gambling on so large a scale. The

laws of Nebraska must be enforced with equal vigor throughout the state. The referendum principle applies only to the making of laws, not to their enforcement. When it comes to law enforcement there cannot be any such thing as community option. Neither individuals nor organizations nor communities can be permitted to select the laws that they wish to obey; such a policy would inevitably lead to a breakdown of all law enforcement machinery. This question of enforcing the gambling laws of Nebraska is particularly pertinent at this time in view of the appointment by President Hoover of a commission on law enforcement and law observance. When this commission shall make its report two years from now I crave for Nebraska the honor of heading the list of states which observe and enforce the law of the land efficiently and without favoritism.

This office of course has no objection to horse racing as such. We trust and believe that your races can be a success without the gambling; horse races are colorful and exciting and worthy of patronage by all lovers of fine horses.

Sincerely yours,
C. A. SORENSEN, Attorney General.

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